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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-683

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

versus

CONTINENTAL OIL COMPANY and
CHARLES N. DUDDLESTON, d/b/a
DUDDLESTON WELDING COMPANY,
Respondents.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CONTINENTAL OIL COMPANY and
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Warren E. Burger, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The Petitioner, INSURANCE COMPANY OF NORTH AMERICA, prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on September 29, 1971.

## OPINIONS BELOW

The Opinion of the Court of Appeals for the Fifth Circuit (*App.* A., *infra*, pp. 54a) is as yet unreported.

The Opinions of the District Court for the Western District of Louisiana (*App.* A, *infra*, pp. 45a) are as yet unreported.

## JURISDICTION

The Judgment of the court below (*App.* A. *infra*, pp. 23a) was entered on September 29, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

Whether the trial court committed legal error in its interpretation of *Rodrigue v. Aetna Casualty & Surety Company*, 395 U.S. 351 (1969), by holding that the Louisiana Doctrine of Contributory Negligence applied to accidents occurring on fixed platforms on the Outer Continental Shelf.

## STATEMENT OF THE CASE

It seems appropriate to preface this Brief of a rather complex fact situation with a list of the parties, the abbreviations given their names in the Record and a brief description of the roles played by each.

| | |
|---|---|
| Continental Oil Company | Referred to as "Continental," this company owned the white tank, the source of the explosion, and operated Platform 194-F on which the explosion and fire occurred. |

| | |
|---|---|
| Donald Ray Smith | "Smith" was the sole representative of Continental and the person in charge of the platform. |
| Charles N. Duddleston, dba Duddleston Welding Company | "Duddleston" was an independent welding contractor, retained by Continental to fabricate a Schlumberger rack over the white tank. |
| James Donald Duddleston | Referred to as "the welder," James Duddleston's welding torch provided the source of ignition for the explosion and fire. He was the son and employee of Duddleston. |
| Houma Well Service, Inc. | "Houma" owned the platform drilling rig until approximately three days prior to the accident. |
| Crown Petroleum Corporation | "Crown" purchased the drilling rig from Houma and was in the process of negotiating a contract with Continental when the accident occurred. |

| | |
|---|---|
| Harvey P. Herrington | "Herrington" was the Crown tool pusher, the ranking Crown employee on the platform. |
| Insurance Company of North America | "INA" was the longshoremen's and harbor workers' compensation insurer of all employees except Duddleston and Smith. Petitioner INA was also the hull damage insurer of the drilling rig and, as such, the Plaintiff in one of these consolidated cases. |

## THE OPERATIVE FACTS

On February 3, 1967, an explosion and fire erupted on a fixed platform on the Outer Continental Shelf off the coast of Louisiana. Six men were killed, several were seriously injured and several hundred thousand dollars property damage resulted from this catastrophe. The platform, designated "194-F", was owned by a joint venture then known as CATC and was being operated by one of its partners, Continental, on behalf of the joint venture. Previously, several wells had been drilled from the platform and these wells were being systematically "completed" and "tested" when the accident occurred.

Situated on the platform when the accident occurred was a drilling rig that Continental had contracted for

from Houma. Just prior to the accident, however, the rig had been purchased from Houma by Crown. The over-all supervisor of operations on the platform was the Continental Drilling Foreman. At the time of the accident, the Continental Foreman was Smith.

The drilling and rework contract between Continental and its drilling contractor divided the responsibility for the various aspects of the operation between the two companies. For example, the installation and cost of logging and perforating of the equipment was the responsibility of Continental. This equipment, usually referred to as the "Schlumberger unit" in the Record, had been placed on the rig but in an inconvenient location. Plans were made, therefore, to fabricate a rack to hold the unit and to attach the rack to the northeast part of the rig. Although the rack may have become a permanent fixture on the rig, the cost of its fabrication and installation was to be borne by Continental. In furtherance of these plans, Continental contracted with Duddleston to furnish a welder to install the rack.

Another contractual obligation of Continental was to furnish fuel for the operation. It was understood that the fuel would be diesel fuel, inasmuch as gasoline engines were not allowed on offshore platforms because of the fire hazard. Diesel fuel, on the other hand, is relatively stable and is not highly volatile. In fact, when diesel is used to support a flame it is necessary to use a wick to hasten evaporation and to permit sustained combustion. In addition to its use as a fuel, diesel was also used to "displace" wells during the process of completion. Also, because it is a good solvent

and relatively safe, it was used to wash down the drilling rig.

The drilling contractor had two tanks for the storage of diesel fuel on the rig. One was called the "day tank" and the other was called the "reserve tank." In addition to these, Continental had placed a large cylindrical white tank on the northeast corner of the platform. The white tank was originally an upright 400-barrel storage tank that had once been on a production platform. It had been damaged and brought into the CATC base in Cameron, Louisiana. There it was modified and sent out to Platform 194-F. As modified, it rested horizontally in a cradle and had a valve opening on one end near the bottom. On the top was a four-inch threaded opening and a two-inch "gooseneck" vent in close proximity to each other. On the platform the white tank was referred to as the "auxiliary diesel tank" or simply as the "diesel tank." Diesel fuel had been pumped into the tank and withdrawn from the tank at various times and all estimates placed over one hundred barrels of diesel fuel in the tank when the accident occurred.

Still another aspect of the operation falling within the contractual responsibility of Continental was the testing of wells. For this, Continental engaged Central Equipment Rentals, Inc. of Lafayette, Louisiana. Central conducted two series of tests, the first on January 24th and the second during the night of February 1st. When the wells were tested, water, gas and oil were produced. The product was flowed through a separator and stripped of its liquids. The liquids, referred to in

the testimony as "condensate," contained many of the unstable and highly volatile "lighter ends" of the hydrocarbon spectrum. Because of the nature of the product, no welding or smoking was allowed on this platform during the testing operation.

Prior to the events giving rise to this litigation, condensate was never stored on a drilling platform. Crude oil was and is sometimes stored offshore on production platforms, or tank batteries, but in those cases specially constructed tanks, vented outboard of the platforms are used. It had been the practice of Continental in the past to dump the liquids produced during testing through a flare line into the Gulf, as was the water and gas in this instance. But other means were available for disposing of the dangerous liquids. Testing companies, such as Central in this case, rented portable "dump tanks" that could be kept alongside on a boat or barge during testing and taken away before other operations were resumed. Other companies burn the liquids as they are emitted from the flare lines.

During the month of January, Continental received a letter from the United States Coast Guard, warning against dumping of contaminants in the Gulf of Mexico. Consequently, a decision was made by Continental supervisors to dump the liquids produced in testing the wells into the white diesel tank. Portable test tanks were readily available at the time and burning was another alternative. Neither was chosen by Continental. Approximately twenty barrels of condensate were dumped into the tank which already contained over

one hundred barrels of diesel fuel. The tank was neither sealed nor vented. No warning signs were posted. No one was told that the condensate had been put in the tank.

The last test started at 7:30 P.M. on February 1st and ended at 8 o'clock A.M. on February 2nd. Upon completion of this test, Central rigged down and left the platform with its equipment. On the morning of February 3rd, a new crew came out and replaced all of the Crown personnel except Harvey Herrington, the tool pusher, who had himself only arrived two days earlier. The only others remaining who had been on the platform during the last test were Smith and the welder. At noon on February 3rd, Smith went to a nearby platform to get cleaned up.

When Smith left the platform, the drilling crew was engaged in nippling up blowout preventers on the cellar deck. This job was part of the drilling contractor's contractual responsibility and its tool pusher, Herrington, was supervising the job. The crane operator, rig welder and roustabout crew were assisting the contract welder in installing the Schlumberger rack. The rack was to be installed immediately above the white diesel tank. Just before the accident, the welder positioned himself above the tank with a cutting torch. There is a conflict in the evidence as to whether Duddleston had just lit his striker or whether he had been cutting for several minutes when the accident occurred. All agree, however, that he became engulfed in a ball of fire. The white tank exploded and flames rapidly covered the rig.

As a result of the explosion and fire, multiple lawsuits, countersuits and third-party demands were filed. Among these was a suit by INA against Continental and Duddleston to recover the $345,000 paid out as a result of fire damage to the drilling rig. The trial court denied this claim outright on the grounds of contributory negligence.

## ARGUMENT

### Rodrigue and the Doctrine of Comparative Fault

The trial court in this case correctly held that the Continental Supervisor, Smith, was grossly negligent in that he knew that the ultra-hazardous condensate had been dumped into Continental's white diesel tank; he knew that there was no seal or outboard ventilation of the tank; he knew that welding was to be conducted directly above the white tank; he was aware that other, safer means were available for disposal of the condensate; he told no one about it. The trial court also held Herrington equally at fault concluding "that the fault of Continental and Herrington was proximate, active and equal." (*App.* A, *infra,* pp. 53a). This holding, coupled with the holding that *Rodrigue* demanded application of the doctrine of contributory negligence, defeated the hull damage claim against Continental Oil Company in its entirety.

The trial of these consolidated cases began on January 3, 1969, and the last testimony was taken on February 3, 1969. The Court and counsel all assumed that

the applicable principles governing the case were those of the law maritime. After the trial was completed, but before a decision was rendered, the case of *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 351 (1969), was rendered by this Court. The trial court interpreted *Rodrigue* to mean that the Louisiana doctrine of contributory negligence applied on fixed platforms on the Outer Continental Shelf and rejected the $345,000 INA hull damage claim *in toto*.

**(1) The Effect of Mutual Fault — Substance or Procedure:**

In the field of conflict of laws, it has long been necessary to categorize rights and remedies as either substantive or procedural:

> "A distinction is made by the courts between those matters which relate to substance, sometimes called matters of right, and those which relate to procedure, or matters of remedy. The latter are governed by the internal law of the forum regardless of where the transactions occurred out of which the claim now in litigation arose."
>
> Goodrich, *Conflict of Laws*, § 80 at 226 (1949).

Although findings of mutual fault are common in all jurisdictions, the effect of such findings varies greatly. Thus, in Louisiana such a finding operates as a complete bar to recovery, regardless of the degree of fault; in the law maritime damages are divided in collision

cases and apportioned according to the degrees of fault in non-collision cases. The obvious question is whether these "effects" are matters of substantive right or procedural remedy. It is interesting that this question intrigued the Louisiana Bar long before the *Rodrigue* decision. See, Comment, Contributory Negligence in the Conflict of Laws: Substance or Procedure? 10 La. L. Rev. 365 (1950). Unfortunately, the writer of that Comment was forced to conclude that Louisiana Courts at the time had not addressed themselves to the problem of how to classify situations involving mutual fault:

> "The Louisiana cases recognize the general distinction between substantive and procedural matters, but no cases have been found which discussed the precise problems treated herein. Unbound by precedence, the way is open for the courts of Louisiana to give full effect to the basic choice of law policies."
>
> *Id.* at 374.

Employing these principles, the Court of Appeals for the Fifth Circuit has already addressed itself to a companion issue and held that the Louisiana Statute of Limitations was a procedural matter not contemplated by the *Rodrigue* decision. *Huson v. Otis Eng'r Corp.*, 430 F.2d 27 (5th Cir. 1970). Counsel urges that like treatment should be given the problem of mutual fault.

There is persuasive historical precedent for rejecting the harsh doctrine of contributory negligence in

this case. At one time, the effect given to mutual fault in collision cases depended solely on the forum. Judge Learned Hand approached the problem quite directly:

> "However, it was held in Belden v. Chase, 150 U.S. 674, 14 S. Ct. 264, 37 L. Ed. 1218, that when action is brought at law in a State court for a collision upon navigable waters the plaintiff loses, if himself negligent. This has been often followed. * * * Conversely, it is well-settled that when the libellant sues in the admiralty upon a tort arising within the territorial waters of a State, his contributory negligence does not defeat him altogether; he need only divide his damages. * * * We can see no escape therefore from concluding that as between a common-law court and a court of admiralty the question is treated as one of procedure, though in general the law is otherwise. It must be the same in the case of a tort over which the admiralty gets jurisdiction only by virtue of the limitation statute. * * * It was not suggested in The Max Morris that the liability there in suit was subject to divided damages because it was maritime, or that action would not be barred at law. Rather it was implied that the rule of forum controlled. So too in Belden v. Chase it was assumed that the doctrine varied with the court. * * * And so we hold, though we acknowledge the anomaly, that in a case such as this the damages must be divided."

*In re Pennsylvania R.R. Co.*, 48 F.2d 559, 565-66 (2d Cir. 1931).

Seventeen years later Judge Hand again indicated that the "effect" of mutual fault was procedural:

> "Moreover, whether the defense is total or partial depends upon the forum."
>
> *Guerrini v. United States*, 167 F.2d 352, 355 (2d Cir. 1948).

Admittedly, the distinction later became unnecessary because the harsh rule of *Belden v. Chase*, 150 U.S. 674 (1893), was ultimately abandoned even in State courts. See, *W. E. Hedger Transp. Corp. v. United Fruit Co.*, 198 F.2d 376 (2d Cir. 1952). But the precedental authority remains that the Federal courts should apply mutual fault in mitigation of damages rather than as a complete procedural bar to recovery in circumstances such as this.

**(2) Is the Louisiana Doctrine "applicable and not inconsistent with *.*.* other Federal Laws"?**

In *Huson*, the appellants argued two basic propositions, that the Louisiana Statute of Limitations was procedural and that *Rodrigue* should not be applied retrospectively. Although the decision of the Court of Appeals for the Fifth Circuit was apparently predicated on the first of these two propositions, that Court raised an even more fundamental question:

> "On argument, we suggested the *Continental Oil* approach that with Federal resources being adequate the Louisiana law (Art. 3536) was not needed and hence was not 'applicable'."
>
> *Huson v. Otis Eng'r Corp.*, 430 F. 2d 27 (5th Cir. 1970).

Indeed, it seems that this Court said in *Rodrigue* that State law was only to be aplied in the absence of an appropriate Federal remedy:

> "Since Federal law, because of its limited function in a federal system, might be inadequate to cope with the full range of potential legal problems, the Act *supplemented gaps in the federal law with state law* through the 'adoption of state law as the law of the United States'."
>
> *Rodrigue v. Aetna Cas. & Surety Co.*, 395 U.S. 357, 358 (1969). (Emphasis added).

Furthermore, the Outer Continental Shelf Lands Act itself quite cautiously states that the law of the adjacent states applies only to "the extent that they are applicable and not inconsistent with * * * other Federal laws." 43 U.S.C. §1333 (2). Surely no one can argue that the Louisiana doctrine of contributory negligence is not inconsistent with the Federal doctrines of comparative fault and divided damages. Surely there is no "void" or "gap" in Federal remedies which require the supplementation of State law. To hold oth-

erwise would again shatter the long-sought-for dream of "uniformity of results," *Levinson v. Deupree*, 345 U.S. 648, 651 (1935).

**(3) Does Rodrigue apply retrospectively?**

The question of whether the *Rodrigue* decision would apply retrospectively was presented in *Huson* but was apparently not the basis for the Court's decision. But the argument is not without merit. Modern legal theorists have seemingly rejected the old Blackstonian viewpoint that the law exists in the ethereal only to be "discovered" from time to time by the courts. Realistically, judicial decisions have historically produced momentous change in societal structures and the *Rodrigue* case is but one narrow example of this. Mr. Justice Frankfurter thus stated:

> "We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights. It is much more conducive to law's self-respect to recognize candidly the considerations that give prospective content to a new pronouncement of law."
>
> *Griffin v. Illinois*, 351 U.S. 12, 25 (1956).

The Court of Appeals for the Fifth Circuit in *Huson* cited the case of *Linkletter v. Walker*, 381 U.S. 618 (1965), in which this Court refused to give retrospective effect to a rule of criminal law because of the

unsettling effects the decision would have by so doing. Similarly, in a civil case, this Court stated:

> "Significant hardships would be imposed on cities, bond holders, and others connected with municipal utilities if our decision today were given full retroactive effect. Where a decision of this court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by holding of non-retroactivity. * * * Therefore, we will apply our decision in this case prospectively."
>
> *Cipriano v. Houma*, 395 U.S. 701, 706 (1969).

This Court has already seen that "injustice or hardship" would result by a retrospective application of *Rodrigue*. As stated at the outset of this application, pleadings and evidence filling over four thousand printed pages were prepared and presented to the trial court at a time when both the Court and counsel firmly believed that all issues were governed by the law maritime. One logical way to prevent injustice would be a holding that *Rodrigue* applied prospectively only. A less desirable alternative would be to allow a remand on all issues affected by the *Rodrigue* decision.

**(4) What is the Louisiana Law of Mutual Fault?**

Perhaps the most ironic aspect of this case is that the clear wording of the Louisiana Civil Code provides a happy solution to the dilemma:

> "The damage caused is not always estimated at the exact value of the thing destroyed or injured; it may be reduced according to the circumstances, if the owner of the thing has exposed it imprudently."
>
> La. Civil Code, art. 2323.

Unfortunately, without considering art. 2323, an early Louisiana Supreme Court borrowed from the common law the more stringent doctrine of contributory negligence. Justice Joe W. Sanders of the presently constituted Louisiana Supreme Court has recently stated that "The importation of common law doctrines at variance with the civil law is by far the most serious breach." Sanders, *"The Civil Law" in the Supreme Court of Louisiana*, 15 La.B.J. 15, 19 (1967). He goes on to say:

> "that code article, now art. 2323 of the 1870 code, announced the principle of comparative negligence. Yet, without mentioning the code article, the court applied the doctrine of contributory negligence, importing it directly from the common law through the citation of an English case. The results of this decision and, of course, the thousands that have followed it for more than a century have been far-reaching. Not only did we take contributory negligence from the common law, but we also took the several doctrines, such as last-clear-chance, needed to relieve the harsh results of contributory negligence. The trouble-

> some refinements of this cluster of doctrines have placed upon the Louisiana Courts one of their heaviest judicial burdens. Today, Louisiana is the only civilian jurisdiction holding to contributory negligence."
>
> *Id.* at 19. See also, Hillyer, *Comparative Negligence in Louisiana*, 11 Tul. L. Rev. 112 (1936); Stone, *Tort Doctrine in Louisiana*, 16 Tul. L. Rev. 489, 500 (1942); Malone, *Comparative Negligence - Louisiana's Forgotten Heritage*, 6 La. L. Rev. 125 (1945); Gainsburgh, *A Brief for Comparative Negligence in Louisiana*, 17 La. B. J. 121 (1969).

In the case of *Grigsby v. Coastal Marine Serv. of Tex.*, 412 F.2d 1011 (5th Cir. 1969), the Court remarked that "Ships and seamen are not strangers to the Louisiana Civil Code," and held that Louisiana substantive law included the doctrine of seaworthiness in application to an accident occurring in navigable waters. That Court cited commentators who reflected that Louisiana law and the law maritime have a common parentage:

> "Maritime law thus grew up and came of age under the tutelage of the civil law, and it still bears the imprint thus acquired, even when administered in the courts of common law countries."
>
> Gilmore & Black, *Admiralty*, 7-8 (1957).
> See also, 1 Benedict, *Admiralty*, 2 (6th Ed. 1940), 4 Benedict, *Admiralty*, 358 (6th Ed. 1940).

The battle over the doctrine of comparative fault still rages in Louisiana over land. But no court has decided, to counsel's knowledge, that the doctrine of comparative fault and art. 2323 do not apply over water. Surely, if the uniquely maritime principle of seaworthiness is encompassed in Louisiana substantive law as applied over water, there is even greater authority that the companion doctrine of comparative fault should also apply.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for A Writ of Certiorari should be granted.

Respectfully submitted by:

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on behalf of Insurance Company of North America, Petitioner, has been served on all parties by depositing same in the United States Mail, postage prepaid, and addressed to their respective counsel of record.

LAKE CHARLES, LOUISIANA: November ——, 1971.

THOMAS M. BERGSTEDT

## APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

NO. 12813 - William Ernest Dickerson, Ind. & for minor Nathan Irwin Dickerson v. Continental Oil Company and Charles N. Duddleston, d/b/a Duddleston Welding Company; Insurance Company of North America, Intervenor and Third Party Defendant; Houma Well Service, Inc. and Crown Petroleum Corporation, Third Party Defendants

NO. 12814 - Shirley Hester, Admx. of Estate of David Hester v. Continental Oil Company and Charles N. Duddleston, d/b/a Duddleston Welding Company; Insurance Company of North America, Intervenor and Third Party Defendant; Houma Well Service, Inc. and Crown Petroleum Corporation, Third Party Defendants

NO. 12815 - Cecil Leroy Van Winkle v. Continental Oil Company and Charles N. Duddleston, d/b/a Duddleston Welding Company; Insurance Company of North America, Third Party Defendant and Intervenor; Houma Well Service, Inc. and Crown Petroleum Corporation, Third Party Defendants

NO. 12816 - Joyce A. Clark, Admx. of Estate of Charles E. Clark v. Continental Oil Company and Charles N. Duddleston Welding Company; Insurance Company of North America, Intervenor; Houma Well Service, Inc. and Crown Petroleum Corporation, Third Party Defendants

NO. 12865 - Gilbert Doyle v. Continental Oil Company and Charles N. Duddleston, d/b/a Duddleston Welding Company; Houma Well Service, Inc. and Crown Petroleum Corporation, Third Party Defendants; Insurance Company of North America, Intervenor

NO. 1879 - David Ardell Clark v. Continental Oil Company and Charles N. Duddleston, d/b/a Duddleston Welding Company; Houma Well Service, Inc. and Crown Petroleum Corporation, Third Party Defendants; Insurance Company of North America, Intervenor

NO. 12927 - Etrophe J. Guillory v. Continental Oil Company and Charles N. Duddleston, d/b/a Duddleston Welding Company; Houma Well Service, Inc. and Crown Petroleum Corporation, Third Party Defendants; Insurance Company of North America, Intervenor

NO. 12938 - Insurance Company of North America v. Continental Oil Company and Charles N. Duddleston, d/b/a Duddleston Welding Company; Houma Well Service, Inc. and Crown Petroleum Corporation, Third Party Defendants; Crown Petroleum Corporation, Intervenor

NO. 13055 - Lula Mae Taylor v. Continental Oil Company and Charles N. Duddleston, d/b/a Duddleston Welding Company; Insurance Company of North America, Intervenor and Third Party Defendant; Houma Well Service, Inc. and Crown Petroleum Corporation, Third Party Defendants

NO. 13248 - Mrs. Ruth Clark, as personal representative of the Estate of Ardell Clark v. Continental Oil Company and Charles N. Duddleston, d/b/a Duddleston Welding Company; Insurance Company of North America, Intervenor; Continental Oil Company and Crown Petroleum Corporation, Third Party Defendants

NO. 13406 - Ethelyn Mitchell Dunham, as Natural Tutrix of Minor Theresa Lynn Hester v. Continental Oil Company and Charles N. Duddleston, d/b/a Duddleston Welding Company; Houma Well Service, Inc., Crown Petroleum Corporation and Insurance Company of North America, Third Party Defendants

NO. 13484 - Charles N. Duddleston and Dorothy Mae Duddleston v. Continental Oil Company and Donald Ray Smith; Crown Petroleum Corporation, Insurance Company of North America and Houma Well Service, Inc., Third Party Defendants

NO. 13526 - Ocie D. Monk v. Continental Oil Company and Charles N. Duddleston, d/b/a Duddleston Welding Company; Houma Well Service, Inc. and Crown Petroleum Corporation, Third Party Defendants; Insurance Company of North America, Third Party Defendant and Intervenor

NO. 13541 - Esta Faye Bishop and as Guardian of Minor Maxcey Lynn Williams, Gary Lee Williams and Bob Franklin Williams v. Continental Oil Company and Charles N. Duddleston, d/b/a Duddleston Welding Company; Houma Well Service, Inc. and Crown Petroleum Corporation, Third Party Defendants; Insurance Company of North America, Third Party Defendant and Intervenor

*ALL CASES CONSOLIDATED FOR TRIAL*

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These multiple suits seek damages for alleged wrongful deaths, personal injuries and property damage growing out of an explosion and fire which occurred on February 3, 1967 on an offshore stationary (fixed) drilling platform located in the Gulf of Mexico, on the Outer Continental Shelf. Killed as a result were Earl Bishop, Charles E. Clark, Ardell Clark, Charles N. Duddeston, David Hester and James Taylor. Each man's family brought suit for wrongful death under the Death on the High Seas Act, 46 U.S.C.A. 761, et seq. David Arnell Clark, Gilbert Doyle, William Dickerson, Etrophe J. Guillory, Ocie D. Monk and Cecil Leroy Van Winkle were injured in the explosion and have filed suit under the General Maritime Law. All plaintiffs, save and except those in the Duddleston case, have named as original defendants Continental Oil Company (the owner of the fixed platform) and Duddleston Welding Company. Each defendant turns on the other and every other party with a now-familiar refrain: "I am not liable, but if I am, then someone else is more so, and more so to me." Continental has filed third party demands and/or crossclaims against Crown Petroleum Corporation, Insurance Company of North America, Duddleston and Houma Well Service, Inc. Subsequent to the trial of these cases the Supreme Court decided Rodrigue v. Aetna Casualty and Surety Company, 395 U.S. 352 (June 9, 1969). There, the Court held that fixed platforms[1] on the Outer Continental Shelf were "artificial islands" which were to be treat-

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[1]A fixed platform is a stationary drilling platform embedded in the ocean floor by pilings. These are to be distinguished from submersible drilling barges — vessels which are floated to the location and sunken to carry out the drilling operations. The law applicable is drastically different.

ed like federal enclaves within a state, and that they were governed by the Outer Continental Shelf Lands Act (43 U.S.C.A. 1331, et seq.), which incorporated and federalized the law of the adjacent state where not inconsistent with federal law. On the basis of the pronouncements there made, the law applicable as to negligence and quantum is the law of Louisiana.

Prior to entering formal findings and conclusions, a brief statement is in order as to the chronological sequence of events. For some time prior to February 3, 1967, Houma Well Service, a drilling contractor, under a written agreement with Continental Oil Company as the owner of the stationary platform, was drilling oil wells on the platform involved in these cases. On January 23, 1967, Continental began testing one of these wells. This testing was done by an independent contractor, Central Equipment Rental, Inc., which on January 23, 1967 hooked up the chicksand and hose from the testing equipment over to the "white tank." The records of Central Equipment reveal that on the first day of tests, January 24, 1967, eight barrels of condensate were metered through the separator and into the top of the "white tank" located on the northeast corner of the platform. The second testing commenced at 7:30 P.M. on February 1st and lasted until 8:00 A.M. on February 2nd, and during this time an additional eight barrels of condensate were metered into the "white tank." On the same day, Continental ordered out a contract welder (Duddleston) to do some work on a rack on which was to be placed a Schlumberger unit. Pursuant to that agreement Jim Duddleston, son of the owner, reported to the platform. He was instructed

that there would be no welding done that night and that he could go to bed. On February 1st Harvey Herrington came to the platform to act as a tool pusher for the new owner of the rig, Crown Petroleum Corporation. On the morning of February 2nd, while testing was in progress, Donald Ray Smith, the foreman for Continental and the only representative of Continental on the platform, called together Herrington and Duddleston and told them that they were to install the rack. Smith testified that Herrington knew about it anyway, and that he told Herrington to take the rig welder and Jim Duddleston out and show them what they were to do, talk it over, and decide how they wished to do the job. Smith said this conversation occurred at about 7:00 A.M. on February 2nd. Smith also testified that later that morning — about 10:00 A.M. — he noticed that the four-inch bull plug was not in the top of the white tank and asked Herrington to find the four-inch bull plug and put it in the tank. Herrington came back and said he could not find the four-inch bull plug, but that a bucket had been placed over the opening until he could go and find the bull plug and put it in. Smith told Herrington he did not want any welding done around the tank until the bull plug was in place. Smith testified that he, at no time, thought there would be cutting done with a cutting torch above the white tank. Smith left the platform around noon on February 3rd and at about 3:45 that afternoon, while Duddleston was welding over the white tank, the explosion occurred.

Continental's first defense is that it was the principal and Houma Well Service and/or Crown Petroleum Corporation were contractors within the meaning of

L.R.S. 23:1061, commonly referred to as Section 6 of the Compensation Act, and that therefore plaintiffs' exclusive remedy against the principal is under the Louisiana Workmen's Compensation Act. If the Louisiana law is applicable to this facet of the case, Continental would be correct. (Thibodaux v. Sun Oil Company, 40 So. 2d 761, La. App. 1949, affirmed 218 La. 453, 49 So. 2d 852; Fontenot v. Stanolind Oil & Gas Company, 144 F. Supp. 818, affirmed Fifth Circuit, 243 F. 2d 574; Bruce v. Travelers, 266 F. 2d 781; Castille v. Liberty Mutual Insurance Company (5th Cir.), 356 F. 2d 509). This is true because Continental, a major company engaged in the production, refining and sale of petroleum products, would be held responsible if one of the contractors' employees in the case was seeking to hold Continental liable under the Workmen's Compensation Act. However, on this facet of the case Louisiana law is not applicable. That Outer Continental Shelf Lands Act states in precise language that the Longshoremen's and Harborworkers' Compensation Act is applicable in instances of employee disability or death stemming from injuries resulting from operations on fixed rigs in this area. 43 U.S.C.A. 1333(c). *Rodrigue* effects no change in this regard. Continental argues to the contrary and insists that Rodrigue held fixed rigs to be artificial islands which are not governed by maritime concepts and accordingly, the Harbor Workers Act does not apply. This argument misconstrues and overly expands the *Rodrigue* doctrine and ignores the power of Congress to make the Harbor Workers' Act applicable even to purely non-maritime settings. Here, there is no void on the issue of compensation. The Louisiana Compensation Act is not ap-

plicable. The question remains: Under the Harbor Workers' Act, 33 U.S.C.A. 901 et seq., is a general contractor a "third person" who may be sued by an injured employee of a subcontractor? Stated differently, does the general contractor (Continental) have an employer's immunity which the Act expressly affords. Surely, as the Chief Judge of this Circuit has stated on several occasions, "a holding narrowing, withdrawing, or restricting the rights of an ambiguous-amphibious would be stemming the strong judicial tide." Continental does not have an employer's immunity under the Act. Probst v. Southern Stevedores (5th Cir., 1967), 379 F. 2d 763, is sound law and *Rodrigue* does not in any way weaken the principles there enunciated.

We proceed to enter findings of fact and conclusions of law on the issues of negligence and contributory negligence.

## FINDINGS OF FACT

1. On February 3, 1967, an explosion and fire erupted on a fixed platform located on the Outer Continental Shelf off the Louisiana Coast. The platform, designated "194F," was owned by a joint venture then known as CATC and was being operated by one of its partners, Continental Oil Company, on behalf of the joint venture. Several hydrocarbon wells had been drilled from the platform and the systematic completion of the wells was in progress when the accident occurred.

2. Situated on the platform when the accident occurred was a drilling rig that Continental had contract-

ed for with Houma. This rig was there pursuant to a written agreement styled "Drilling and Re-work Contract." All parties agree that Houma, up until it sold its rig, operated under that contract. Houma sold the rig to Crown for $50,000 cash and the balance represented by notes. This sale took place on January 24, 1967. We will not detail the evidence, but we find as a fact that Crown assumed the obligations of the contract between Houma and Continental. The members of the crew had all been hired by Houma, but by stipulation between Houma and Crown, they (including Herrington) were employed by Crown when the accident occurred. Crown was the statutory employer of all but one of the employees whose deaths or injuries precipated this litigation. As to these plaintiffs the remedy against Crown is exclusively under the Longshoremen's Act. Crown's insurer is paying benefits under the Act and has intervened seeking recovery from defendants by preference and priority of the amounts paid.

3. The overall supervisor of operations on the platform was the drilling foreman employed by Continental Oil Company. This man's name was Donald Ray Smith. His regular job was that of Production Foreman but he had been temporarily assigned to the Drilling Department because Continental was "shorthanded" in that department. Smith departed from the rig 3 3-4ths hours before the fire started. Herrington, the tool pusher for Crown, was in charge at the time of the explosion. He was in the course and scope of his employment with Crown pursuant to Houma's contract with Continental.

4. The Schlumberger Unit had been placed on the rig but in an inconvenient location. Plans were made to fabricate a rack to hold the unit to attach the rack to the northeast part of the rig. Although the rack may have become a permanent fixture on the rig, the cost of its fabrication and installation was to be borne by Continental. In furtherance of these plans, Continental contracted with Duddleston Welding Company to furnish a welder to install the rack. The welder who came out was James Duddleston, son of the owner of Duddleston Welding Company. Smith informed Herrington and Jim Duddleston that they were going to have to install the rack on which to put the Schlumberger Unit.

5. Continental had two tanks for the storage of diesel fuel. One was called the "day tank" and the other was called the "reserve tank." In addition to these, Continental had placed a large cylindrical white tank on the northeast corner of the platform. The white tank was originally an upright 400-barrel storage tank which had once been on a production platform. It had been damaged and brought in to the CATC base in Cameron, Louisiana. There it was modified and sent out to Platform 194F. As modified, it rested horizontally in a cradle and had a valve opening on one end near the bottom. On the top was a four-inch threaded opening and a two-inch "gooseneck," vent in close proximity to each other. On the platform the white tank was referred to as the "auxiliary diesel tank" or simply as the "diesel tank." Diesel fuel had been pumped into the tank and withdrawn from the tank at various times and all estimates placed over 100 barrels of diesel fuel in the tank when the accident occurred.

6. Another aspect of the operations falling within the contractual responsibility of Continental was the testing of the wells. For this, Continental engaged Central Equipment Rentals, Inc., of Lafayette, Louisiana. Central conducted two series of tests, the first on January 24th and the second during the night of February 1st. When the wells were tested, water, gas and oil were produced. The product was flowed through a separator and stripped of its liquids. The liquids, referred to in the testimony as "condensate," contained many of the unstable and highly volatile "lighter ends" of the hydrocarbon spectrum. Because of the nature of the product, no welding or smoking was allowed on the platform during testing operations.

7. Prior to the events giving rise to these litigations, condensate was never stored on a drilling platform. Crude oil was and is sometimes stored offshore on production platforms or tank batteries but in those cases specially constructed tanks, vented outboard of the platforms, are used. It had been the practice of Continental in the past to dump the liquids produced during testing through a flare line into the Gulf as was the water and gas in this instance. But other means were available for disposing of the dangerous liquids. Testing companies such as Central in this case, rented portable "dump tanks" which could be kept alongside on a boat or barge during testing and taken away before other operations were resumed. Other companies burned the liquids as they emitted from the flare line.

8. During the month of January, Continental received a letter from the United States Coast Guard,

warning against dumping contaminates into the Gulf of Mexico. Consequently, a decision was made by Continental supervisors to dump the liquids produced in testing the wells on 194F into the white diesel tank. Portable test tanks were readily available at the time and burning was another alternative. Neither was chosen by Continental. Approximately twenty barrels of condensate were dumped into the tank which already contained over 100 barrels of diesel fuel. No warning signs were posted. Herrington knew or should have known that condensate had been put in the tank.

9. The last test started at 7:30 P.M. on February 1st and ended at 8:00 A.M. on February 2nd. Upon completion of this test, Central rigged down and left the platform with its equipment. On the morning of February 3rd a new crew came out and replaced the old crew. Harvey Herrington, the tool pusher, remained in charge of the crew. The only others remaining who had been on the platform during the last test were Don Smith and the contract welder, James Duddleston. At noon on February 3rd, Don Smith went to a nearby platform. His stated purpose in leaving was: "I wanted to go to an adjoining platform and take a bath and clean up and wash my clothes."

10. When Smith left the platform, the drilling crew was engaged in nippling up blowout preventers on the cellar deck. The crane operator, rig welder and roustabout crew were assisting the contract welder in installing the Schlumberger rack. The rack was to be installed immediately above the white diesel tank. Just

before the accident, the contract welder, James Duddleston, had positioned himself above the tank with a cutting torch. There is a conflict in the evidence as to whether Duddleston had just lit his striker or whether he had been cutting for several minutes when the accident occurred. All agree, however, that he became engulfed in a ball of fire. The white tank exploded flames rapidly covered the rig.

11. On the morning before the explosion, Smith noticed that the four-inch bull plug was not in the top of the white tank and he asked Herrington to go find the four-inch plug and put it in the tank. Herrington could not find a plug and said that he put a bucket over the opening, and that he would find a plug later. Smith told Herrington that he did not want any welding done around the white tank until the bull plug was in. Smith had thought that the braces would have been cut on a pipe rock and there would be no need to measure and cut the braces with a cutting torch above the white tank. The evidence reveals further that Herrington, contrary to what he told Smith, apparently did not look for a plug, but called on the driller, Fregia, to put a bucket over the four-inch opening. Fregia testified that he was told to do this on the morning of the fire. Actually, the person who put a bucket over the four-inch opening was Claude Blanchard, who was told to do so by Fregia. He said that he used a piece of iron to hold down the bucket because the wind would blow it off. Some way, it did disappear and we find there was no covering over the hole from 11:30 A.M. until the time of the explosion. (Testimony of Blanch-

ard, Van Winkle, Dickerson, David Clark, and Clifton Frezia.

12. There is a conflict of evidence as to just what caused the fire and explosion. Paul Montgomery, a petroleum engineer, opined that the point of ignition was outside the tank. Montgomery was of the opinion that it mattered not whether the four-inch opening had been plugged or covered prior to the welding operation because the two-inch vent would have allowed vapors to accumulate in the same relative position. On cross-examination he conceded that before there can be a fire there must be oxygen, and that in order to have an explosion in the tank, which did occur, there had to be oxygen there. It is argued that this opinion is in direct conflict with Montgomery's earlier statement that the tank was emitting vapors from the condensate and had forced the oxygen out. We have studied the testimony long and hard and have attempted to proceed with caution in the realization that we are dealing with probabilities and there is much room for division of opinion. But, we find from the testimony of Taylor and O'Connor that the point of ignition was in the tank, which is more logical and that the probability is that slag dropped into the four-inch opening, causing the ignition which resulted in the spread of vapors and the consequent explosion, which shot flames out of the four-inch opening and out the north end of the tank. In either event, we find that if the four-inch opening had been closed in a proper manner, the accident probably would not have occurred.

13 Smith knew condensate had been placed in the tank. He knew welding was to be conducted in the vicinity of the tank. He told no one of the existence of the condensate. He was aware that safety dictated storing of condensate in sealed tanks vented away from any possible source of ignition.

14. Smith was precise and honest in his testimony, including subsequent questioning by the Court:

> THE COURT:
>
> Sir, is it fair to say that you knew that welding was being performed in the proximity to the white tank, and you knew at the time that condensate was in that tank?
>
> THE WITNESS:
>
> Yes, sir.
>
> THE COURT:
>
> Is that a fair statement?
>
> THE WITNESS:
>
> Yes, sir.

15. It is conceded by all that the cause of the explosion was welding over the white tank while it contained condensate. Except for Duddleston, it is clear that none of the claimants or claimants' decedents, were negligent.

16. We find this accident was proximately caused by negligence on the part of Continental in the following particulars:

(a) In failing to provide safe storage for liquids and gases with highly volatile properties;

(b) In causing or permitting said liquids and gases to be stored in a tank which was being used for diesel fuel and liquids of less dangerous properties;

(c) In permitting welding operations in an area containing an explosive atmosphere nearby;

(d) In failing to post signs and otherwise warn workmen that the storage tank contained highly volatile liquids and gases;

(e) In storing condensate on board a platform at sea when safer alternatives were available.

17. We find Crown proximately negligent through the acts of its tool pusher, Herrington, in the following particulars:

(a) In failing to properly supervise the work that was being done at the time of the fire and explosion;

(b) In failing to cover the four-inch opening when he knew that welding was to be performed over it and when he knew or should have known that condensate was in the tank. For Herrington to permit welding above the tank without having a plug put in the four-inch hole, as he had told Smith, the Continental pusher, that he, Herrington, would do, and then not to make sure

that it was done is negligence of the grossest kind.

It should be noted here that Clifton Fregia, Crown's driller, and Neal Blanchard, Crown's motorman, were also present and participated in the "bucket over the hole" episode.

18. The negligence of Continental and Herrington is clear, convincing and gross. Duddleston's position gives us extreme difficulty. Duddleston's expert, Montgomery, testified that if he were welding over the tank with the four-inch open hole, he would have covered it. There was testimony that while the welding was in progress, sparks were falling above and dancing around the top of the white tank (Deposition of Dickerson). Was a proximate cause of this tragedy the alleged carelessness of Duddleston's cutting above the tank without the four-inch opening being closed or covered? All counsel, except Duddleston's, insist that it was. They cite Kernan v. American Dredging Company, 355 U.S. 426, and argue that Duddleston violated a duty of performing his work in a workmanlike manner and the breach of that duty was a proximate cause of the fire and explosion, and the resulting deaths and damages. He who alleges negligence must prove it affirmatively by a preponderance of the evidence. This is one of those instances where the facts and inferences do not preponderate one way or the other. We must and do find that plaintiffs have failed to carry their burden of proving proximate negligence on the part of Duddleston.

19. Jim Duddleston was on the platform working for his father, pursuant to a contract between Continental and Charles. N. Duddleston, d/b/a Duddleston Welding Service. He brought his own welding equipment aboard with which to accomplish the work. He was not the loaned employee or borrowed servant of either Continental or Crown Drilling Company. Benoit v. Hunt Tool Co., 219 La. 380, 53 So. 2d 137.

## CONCLUSIONS OF LAW

1. In Louisiana, general tort liability is imposed by L.S.A. Civil Code Article 2315, which in effect provides that every action whatsoever of man which causes injury to another obliges him by whose fault it occurred to make restitution.

2. No citation of authority is needed to support the proposition that fault, as envisioned in Article 2315, is synonymous with negligence.

3. It is equally well established that for negligence to give rise to an action ex delicto under Article 2315, it must be a proximate cause of the accident.

4. Under the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C.A. 901, et seq., Continental does not have an employer's immunity. Probst v. Southern Stevedoring Company, 379 F. 2d 763. Crown does have that immunity insofar as the personal injury and death claims are concerned.

5. If Duddleston (the welder) was the borrowed servant of Continental at the time the injury occurred, this legal theory, if established, would limit Continental's liability to compensation under the Longshoremen's and Harbor Worker's Compensation Act, since Duddleston's exclusive remedy would thus be under that Act. The factor of control is the most universally accepted standard for establishing an employer-employee relationship. What constitutes "control" has been the subject of much litigation. We have carefully studied the record and find no control by Continental within the meaning and contemplation of that word. The evidence indicates nothing more than cooperation between the several Crown employees aboard the barge, supposedly under the direction of Crown's tool pusher, with Continental's supervisor. In considering whether the power exists to control and direct a servant, a careful distinction must be made between authoritative direction and control and mere suggestion as to details or the necessary cooperation where the work furnished is part of a larger undertaking. We conclude as a matter of law that James Duddleston was not a borrowed employee of Continental. Ruiz v. Shell Oil Company (5th Cir., 1969), 413 F. 2d 310.

## QUANTUM IN THE DEATH CASES

Damages in cases such as this cannot be computed by mathematical formulae nor derived from fixed principles susceptible of being programmed into a computer. Two recent Fifth Circuit cases are illustrative of the different views of the same court. Neal v. Saga Shipping Company (No. 24,908) and Grigsby v.

Coastal Marine (No. 22,451). The simple truth is that there are too many variables. None of us can divine the future. Here, we are governed by Louisiana. The Supreme Court of that state has categorically rejected the use of mathematical formulae in awarding damages. McFarland v. Illinois Central RR, 127 So. 2d 183; Pennington v. Justiss-Mears Oil Company, 134 So. 2d 59. The amount to be fixed in each case calls for the independent judgment of an independent judge.

(1) *Carroll James Taylor* -- Married Lula Mae Leger on March 18, 1961; Carroll was 19 years of age and Lula Mae was 18; they were high school sweethearts; both were high school graduates; of their marriage only one child was born, Randall Taylor, on January 20, 1962; they lived together continuously with the exception of a short period of time during a portion of Carroll's military service, until he died on February 7, 1967 as the result of injuries received in the accident sued upon. Carroll was in the military service from January, 1961 through January, 1964. He commenced work in February of 1965. His 1966 federal income tax return reflected his earnings to have been $7,022. Of that amount he earned approximately $789.26 over and above the wages he earned from Houma Well Service, thus revealing his willingness to work and his capacity to do so. The accident occurred on February 3, 1967 and Carroll died on February 7, 1967 — four days later. Her husband's work expectancy was 38 years. He had third degree burns over 65% of his body; he knew he was going to die, and there is no question that he suffered severe pain.

In this case we fix damages as follows:

| | |
|---|---|
| (1) For loss of support, contributions, or as sometimes stated, pecuniary loss: | |
| (a) Mrs. Taylor | $68,000.00 |
| (b) Randall Taylor | 30,000.00 |
| (2) For the loss of society, love and companionship of deceased and the grief and anguish of the beneficiaries: | |
| (a) Mrs. Taylor | 15,000.00 |
| (b) Randall Taylor | 15,000.00 |
| (3) Conscious pain and suffering of decedent prior to his death | |
| (a) Mrs. Taylor | 10,000.00 |
| (4) Funeral expenses | |
| (a) Mrs. Taylor | 2,791.25 |
| Total | $140,791.25 |

(2) *Ardell Clark* — This is the claim of Mrs. Ruby Mae Clark for the death of her husband, Ardell. Mrs. Clark was 50 years of age at the time of her husband's death, and he was 51. She had two children, both of whom were over 21 years. No claim was made by these children. David Clark, son, has filed his own suit for personal injuries sustained in the accident. Mrs. Clark was a licensed practical nurse at Ft. Polk. Her husband's work expectancy was 16 years. We make an award as follows:

| | |
|---|---|
| (1) For the loss of support, contributions, or as sometimes stated, pecuniary loss | $36,000.00 |
| (2) For the loss of society, love and companionship of deceased, and her grief and anguish | 15,000.00 |
| (3) Funeral expenses | 599.52 |
| Total | $51,999.52 |

(3) *Charles Everett Clark* — The plaintiff, Mrs. Joyce Clark, and the decedent were married on March 11, 1961 and three children were born of this marriage: Steve Adam, age 1; Troy Dale, age 4; Charles E. Clark, age 5. The deceased was 27 years of age at the time of his death and had a life expectancy of 43.7 years and a work expectancy of 36 years. At the time of his death he had worked in the oil field about two years and was earning $592 per month. The income tax returns introduced into evidence indicated that in 1964 Mr. Clark earned $4,800 and in 1965, $5,000. His 1966 income was $6,656.91. The earnings record of Mr. Clark fluctuated quite a bit, depending on for whom he was working and how much work he was able to obtain.

In this case we fix damages:

| | |
|---|---|
| (1) For the loss of support, contributions or as sometimes stated, pecuniary loss: | |
| (a) Mrs. Clark | $40,000.00 |
| (b) Steve Adam | 21,000.00 |

| | |
|---|---|
| (c) Troy Dale | 20,000.00 |
| (d) Charles E. | 19,000.00 |
| (2) For the loss of society, love, and companionship of deceased, and anguish of beneficiaries: | |
| (a) Mrs. Clark | 15,000.00 |
| (b) Steve Adam | 10,000.00 |
| (c) Troy Dale | 10,000.00 |
| (d) Charles E. | 10,000.00 |
| (3) Funeral expenses | |
| (a) Mrs. Clark | 1,521.00 |
| Total | $146,521.00 |

(4) *David Hester* — This involves the dual claim of Mrs. Shirley Hester and Mrs. Ethelyn Dunham for the death of David Hester. Mrs. Dunham is suing to obtain support for a child born of the marriage between her and the deceased. This marriage ended in divorce in 1961. Mrs. Shirley Hester is suing for damages on behalf of herself and two children. Mrs. Shirley Hester married David in 1964. Since that time two children were born — Angela Fay Hester and David Newton Hester. The girl was born on October 10, 1965 and the boy had not been born at the time of his father's demise. David Hester was 29 years of age. In this case as in the other cases the earnings as reflected by the record reveal that from his earnings, income tax deductions and other expenses were taken out before the family realized monetary gains. Shirley and David Hes-

ter were informally separated in July of 1965. At that time she returned to work and worked until they resumed their marital relations in October of 1966. She stated that the reason for their separation was Mr. Hester's drinking and staying out late. The baby girl (Angela Fay), who was born on October 10. 1965, was over a year old when she first lived with her father. Shirley also testified that her husband did not provide any support nor did he visit the child of his first marriage to Ethelyn Dunham. She testified that the only time he saw that child was when he went to the school yard and viewed her from a distance. It is this child in whose behalf Mrs. Ethelyn Dunham entered suit. Mrs. Dunham was married to David in 1956 and their child (Theresa Lynn) was born in July of 1957. At the time of the separation she was awarded custody of the child and $100 per month for child support. However, Hester never paid this amount, and in fact the only payment made for the support of the child was on one occasion and the amount was $35.00. At one time Mrs. Dunham filed non-support charges against David Hester in an attempt to obtain the support awarded by the court. However, they were unable to find Hester and no further actions were taken. Mrs. Dunham readily admitted that after Hester moved back to DeQuincy, where she was also living, she made no effort to obtain child support. Counsel for defendant, Continental, urges by brief that the child of the first marriage has lost nothing by the death of her father, and there is no basis for any award to Mrs. Dunham. Continental also argues that the facts and circumstances of this case are such to suggest to the court a good possibility that Mrs. Shirley Hester would not

have been married to David Hester for any given period of time.

The record indicates that David Hester's earnings fluctuated quite a bit over a three-year period preceding his death. The tax returns reveal that in 1964 he worked for five different employers and earned $5,057.66. In 1965 he worked for eight employers and earned $4,364.05. Again in 1966 he worked for six different employers and earned $3,859.08.

We fix damages in connection with the death of David Hester as follows:

| | |
|---|---|
| (1) For loss of support, contributions, or as sometimes stated, pecuniary loss: | |
| (a) Mrs. Shirley Hester | $25,000.00 |
| (b) David Newton Hester | 15,000.00 |
| (c) Angela Fay Hester | 15,000. |
| (2) For the loss of society, love and companionship and the grief and anguish of the beneficiaries: | |
| (a) Mrs. Shirley Hester | 15,000.00 |
| (b) David Newton Hester | 10,000.00 |
| (c) Angela Fay Hester | 10,000.00 |
| (3) Funeral expenses | |
| (a) Mrs. Shirley Hester | 1,623.40 |
| Total | $91,623.40 |

| | |
|---|---|
| For Mrs. Dunham in behalf of Theresa Lynn, we fix damages: | |
| (a) Pecuniary loss | $13,200.00 |
| (b) Love and affection, and grief and anguish | 10,000.00 |
| Total | $23,200.00 |

(5) *Orus Earl Bishop* — Plaintiff Esther Fay Bishop is the widow of Orus Bishop. She was 43 years of age at the time of her husband's death and he was of the same age. Both had been married once before marrying each other. They were married to each other in 1957. He had two children born of his first marriage; both of these children were married and living away from home at the time of his death. No claim is made on behalf of these children. Mrs. Bishop had three children by her first marriage, all of whom were living with her and Mr. Bishop at the time of his death.

In addition to the claim of Mrs. Bishop in her own behalf she also asserts a claim for the three children of her prior marriage: Gary, age 16; Bob, age 17 and Maxcey, age 21. To support her argument she relies on the Death on the High Seas Act, 46 U.S.C.A. 761, and cases decided under that statute. This argument is not germane because of Rodrigue (supra). There, the Court, in pertinent part, stated.

> "* * * the admiralty action under the Seas Act no more applies to these accidents actually occurring on the islands than it would to acci-

dents occurring in an upland federal enclave or on a natural island to which admiralty jurisdiction had not been specifically extended."

The inapplicability of the Seas Act removes any obstacle to the application of state law by incorporation as federal law through the Lands Act. Applicable here is Article 2315 of the Louisiana Civil Code which reads as follows:

"Art. 2315. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The surviv-

ors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted or irregular heirs, whether suit has been instituted thereon by the survivor or not.

As used in this article, the words 'child,' 'brother,' 'sister,' 'father,' and 'mother' include a child, brother, sister, father, and mother, by adoption, respectively. (As amended Acts 1960, No. 30, § 1.)"

It is true that the Supreme Court of the United States in Levy v. Louisiana, 391 U.S. 68, faulted the Louisiana courts for holding that the word "child" in Article 2315 meant "legitimate" child. The Supreme Court conceded that Louisiana had a broad power to make classifications, but emphasized that it had no right to draw a line which constituted an invidious discrimination against a particular class. It was, added the Court, invidious discrimination to construe the word child so as to deny recovery under Article 2315 by illegitimate children. This case is not *Levy*. Here, there is neither a biological nor legal relationship between Mrs. Bishop's children and the deceased. These children do not fit within the classes of persons to whom Louisiana has accorded a right of action for the death of another.

We fix damages for Mrs. Bishop as follows:

| | |
|---|---|
| (1) For loss of support, contribution, or as some time stated, pecuniary loss | $78,000.00 |
| (2) For the loss of society, love and companionship of deceased and the grief and anguish of the beneficiary | 15,000.00 |
| (3) Funeral expenses | 2,919.95 |
| Total | $95,919.95 |

(6) *James Duddleston* — Mr. and Mrs. Charles N. Duddleston, husband and wife, seek damages for the death of their son, James. The major portion of the itemized claim for damages concerns the alleged loss of future support. There is no showing that James gave any real financial help to his parents. Contribution to the support of the parents is therefore not an element of damages here. James was born August 17, 1946. He was 20-1/2 years of age at the time of his death. Except for the recovery of funeral expenses, the only damages recoverable in this case are for the grief and anguish of the parents, and the loss of companionship, love and affection of their son. Silverman v. Travelers Insurance Company (5th Cir., 1960), 277 F. 2d 257. For these items we allow $20,000 to each parent and to the father an additional $2,000 for burial expenses.

The contention that Duddleston's agreement to indemnify Continental for any claim brought for the death of his employee-son resulted in uniting the quality of both debtor and creditor in the same person, thereby causing a confusion of rights which extinguished the obligation, is not being passed on at this time.

**QUANTUM IN PERSONAL INJURY CASES**

1. *Ocie D. Monk* — This case is vigorously contested. The claim on behalf of Mr. Monk is that he is suffering from an acute anxiety reaction caused by this accident. Mr. Monk testified that the only injuries he received in this entire instance were a few burns, "but nothing serious." His burns were not treated by a physician. At the time of his initial hospitalization Mr. Monk was X-rayed, all tests were negative. Dr. Clark was of the opinion that he was able to return to work as of February 10, 1967 — one week after the accident. No award has been made for Longshoremen's benefits. He was paid $40.00, and medical bills in the amount of $51.85 were paid by the compensation insurer. The Louisiana jurisprudence from the standpoint of recovery of damages for "anxiety reaction," "traumatic neurosis", psychic trauma, etc., has been reviewed by the Fifth Circuit Court of Appeals in Sahuc v. U. S. Fidelity and Guaranty Company. 320 F. 2d 18 (1963). There is certainly ample authority under the Louisiana jurisprudence to support a recovery provided plaintiff can prove by a preponderance of the evidence that the condition complained of exists as a result of the accident. The record reveals that the complaints of

Mr. Monk did not have their origin with the events of February, 1967. The Veterans Administration Hospital records are voluminous. Most of the complaints now asserted are practically the same as were made prior to February, 1967. Plaintiff offers the testimony of Dr. Davidson H. Texada, a physician specializing in neurology and psychiatry. In appraising its effect we must consider his testimony as a whole. The true import of a witness to isolated questions must be ascertained by taking in all the questions and answers. Dr. Texada obviously was aware that the man had a previous history of episodes involving bursts of temper. He felt that the patient showed an acute anxiety type reaction which was improving. He felt that to some extent it was precipitated by the emotional trauma of the explosion and fire. He saw no reason, however, why the man could not return to work of the same type as long as it was not on an offshore rig. He declined to give his opinion as to whether or not the man would now be working if it had not been for the February, 1967 episode. He did not believe Mr. Monk to be a malingerer but felt that Monk's failure to give him a true past history did make him wonder. Dr. Texada, too, realized that this man had begun to break up in 1965 and 1966.

Our conclusion is that this plaintiff suffered no real physical injury. However, he is entitled to recover for shock and mental anguish, and accordingly an award is made to him in the amount of $5,000, plus the amount of his hospital and doctor bills, $1,971.68. Plaintiff has in my judgment failed to prove that his "anxiety re-

action" was proximately caused by the accident in question.

2. *Etrophe J. Guillory* — Plaintiff was a cook's helper aboard the platform when it was razed by an explosion and fire. He was 29 years of age. He leaped some 80 feet from a window into the water. He landed on his left side and left back, went under, and resurfaced spitting blood. He managed to avoid the flames, to reach the underside of the platform, and to pull himself back onto the platform. He was first treated by Dr. Clark, who diagnosed an aspiration type of pneumonia which he treated with oxygen, antibiotics and hospital care at Cameron. He remained at the Cameron Hospital for several days and was then transferred to Ville Platte where he remained in the hospital until February 15th. According to Dr. Hatchette he sustained a neck strain, the symptoms of which might be manifested for a period of three to four months in the form of headaches. Dr. Hatchette did not believe these difficulties were such as to prevent him from working as a cook's helper. Later, the plaintiff was examined by Dr. Coulter, a Lafayette chest specialist. This was on November 13, 1967. Dr. Coulter found no illness other than a common cold. Mr. Guillory went to work for Brown's Furniture Store in Ville Platte on November 15, 1967. The sum of $12,000 is found to constitute full compensation for shock and mental anguish, pain and suffering, injuries, loss of earnings and medical and hospital expenses, together with other items of damages.

3. *Gilbert Doyle* — The plaintiff was a 31 year old white male at the time of the accident. He says that he is still suffering pain in the back and legs. He went to work for Brown & Root some six months following the accident and worked approximately five months offshore, and then continued to work for a time offshore as a heister on a forklift truck on a lay barge. His most recent employment (at the time of the trial) was in December of 1968. The contentions made by claimant are that he is suffering from traumatic neurosis and the possibility of a herniated intervertebral disc.

Dr. Harry Shaheen saw Mr. Doyle on February 23, 1967 at which time his diagnosis was that of a contusion to the lumbo-sacral spine with some muscle spasm, and a mild concussion with consistent headaches. During the summer of 1967 Mr. Doyle failed to return to Dr. Shaheen's office for further treatment and at that time the doctor felt he had completely recovered. The next time Dr. Shaheen saw Mr. Doyle was on January 3, 1969, which was during the trial of this case. Mr. Shaheen, on the basis of the complaints, felt at that time that this man might have a herniated disc. It should be noted that some 18 months had elapsed between the time that Dr. Shaheen had last seen Mr. Doyle until he saw him in January of 1969. The first doctor to treat Mr. Doyle was Dr. Guilbeau who reported that his only injury was a lumbo-sacral bruise. Dr. Hatchette stated that there was nothing he could find that indicated any permanent residual disability. Dr. Edelman, a Neurosurgeon, stated that he could find no evidence of a hernia or ruptured disc.

This Court is of the opinion, based upon these examinations, that Mr. Doyle suffered no permanent injuries as a result of this accident, and we conclude that plaintiff has not proven by a preponderance of the evidence that he sustained a ruptured disc or a traumatic neurosis proximately related to the accident. If an award were made for either of these alleged injuries it would be based on conjecture and speculation. No award was made under the Longshoremen's Act to Mr. Doyle. Medical expenses of $609.73 were paid in his behalf and $1,290 was paid in compensation benefits. Dr. Gilles Morin did testify that this man had some sort of anxiety reaction which would require from six months to a year for recovery.

Our conclusion is that the sum of $9,000 is found to constitute full compensation for all elements of damage sustained by this plaintiff, including that of pain and suffering, injury, loss of earnings, and medical and hospital expenses.

4. *David A. Clark* — This plaintiff was 25 years of age at the time of the accident. He was employed as a crane operator earning approximately $700 per month when the blast which resulted from the explosion on the rig knocked him off his feet. He ran into the kitchen, slid down a hose, and was knocked approximately 30 feet into the Gulf. David testified that he had some burns on his legs, hands and face, with some pain in his back. He stayed in the hospital for approximately two weeks following the accident. Approximately three months following his injuries he returned to work for the Kansas City Southern Railway

Company. He was still complaining of back pains and dizzy spells at the time of the trial. The only doctor to testify on behalf of Clark was Dr. Ben Guilbeau, a general practitioner. He saw Clark on February 3, 1967 and at that time Clark was suffering from first and second degree burns on the face, hands, ankles, and had some pain in the lumbo-sacral area. Dr. Guilbeau released Mr. Clark on March 21, 1967 and his records indicated at the time Clark was doing "just fine." The first degree burns consisted of a redness of the skin and the second degree burns consisted of redness of the skin with induration. It was anticipated that none of these burns would result in scarring. Mr. Clark was paid $520 in compensation and $626.61 for medical expenses. We fix damages in this case at $10,000. This includes an award for all elements of damages, including pain and suffering, loss of wages, medical and hospital bills.

5. *Nathan Irwin Dickerson* — This action was instituted by the father of Nathan Irwin Dickerson, who was 20 years old at the time of the accident. Nathan reached his majority prior to the trial, and at the trial a motion was made that he be substituted as the proper party plaintiff. As indicated by the testimony, the Insurance Company of North America has an intervention claim which on February 3, 1969, totaled $9,445.41, representing $2,125.41 medical and $7,320.00 weekly compensation benefits. In addition to the $2,125.41 medical expenses already paid by the Insurance Company of North America, there were at the time of the trial unpaid medical bills totaling $719.98. In addition, future medical expenses will be incurred, since additional

treatment is contemplated and recommended. Dickerson received burns as he ran through the flames away from the white tank which had exploded. He made his way into the kitchen, out the window and down a hose from which he dropped approximately 25' to 30' into the water. While in the water he "was hurting all over and scared and burning." Dr. Gilbeau described the differing degrees of burns as follows:

> "First degree burns are areas that are just — had a minimum amount of heat, with redness and induration; second degree burns, the skin and area involved is deeper and you develop blebs; and the third degree, you have some actual tissue destruction with the resulting scarring of that area. There were burns on the wrists and forearms of Mr. Dickerson. He progressed fairly well in the hospital except for the ears and a couple of bad spots on his wrists."

With reference to his ears Dr. Guilbeau stated:

> "Well the burn itself had destroyed some of the cartilage and with the resultant infection the cartilaginous part of the ears or the part of the ears that keeps the ears up so to speak the structure of the ear just was completely destroyed and the ears collapsed."

In July of 1967, Dickerson saw Dr. Vincent at which time the doctor found continuing disability and considered the possibility of reconstructing the ears by

addition of either cartilage or a piece of silastic in the ear, replacing the cartilage which had crumpled up or been destroyed by infection. Dr. Vincent observed that if an attempt was made to improve the ears, a series of probably three operations per ear would be necessary. Operations were also considered at this time on plaintiff's hand and such procedures were carried out by Dr. Vincent between August 12, 1968 and August 21, 1968, when plaintiff was admitted to the Touro Infirmary. From a disfigurement and scarring standpoint the photographs which are in evidence and marked Dickerson No. 9 through 13 show the extent of that scarring. Dr. Morin felt that from an orthopedic standpoint, Dickerson had sustained a five (5%) percent partial permanent disability in each wrist. There can be no question but that Mr. Dickerson's mental condition was one of dejection and rejection, because he stated to several of his doctors on several occasions that he was upset because people would laugh at him and children would laugh at him because of the deformity of his ears. There is no question that this was very depressive to this gentleman. Two psychiatrists also testified in this case — Dr. Gilles Morin and Dr. Lyle Wharton. Dr. Wharton is a psychologist and he stated that it was likely that this man's condition had been aggravated by the accident and that he was suffering from a paranoid schizophrenic reaction, moderate. Dr. Morin felt that there were times when he approached being a paranoid, in that he had a general mistrust for anyone who had anything to do with him, including his doctors and lawyers. Dr. Morin's final diagnosis was, "a rather severe anxiety reaction manifested by his discomfort, by his

headaches, and so on, his inability to rest." We believe that much of the emotional and functional difficulties that this man has encountered did exist prior to February, 1967.

All agree that Mr. Dickerson was injured, but the injury was not permanently disabling. He returned to work at Cities Service Oil Company at Lake Charles, Louisiana in the rigging department. He continued in this particular job capacity until December 5, 1967. He also testified that he worked for Cities Service Oil Company from December 7, 1967 to December 18, 1967; March 4, 1968 to May 22, 1968; June 15. 1968 to July 28, 1968; and from October 7, 1968 until November 24, 1968. Dr. Morin thought that most of Mr. Dickerson's headaches were caused by his anger rather than by anxiety reaction. He also opined that after completion of this litigation Mr. Dickerson would probably recover from his anxiety reaction.

Our conclusion is that the sum of $50,000 will constitute full compensation for shock, pain and suffering, scarring, permanent injury, loss of earnings, medical and hospital expenses and all other damage. This judgment of $50,000 covers all elements of damage sustained by Dickerson.

6. *Cecil Leroy Van Winkle* — was 24 years of age. Intervention claimed by the Insurance Company of North America totals $4,010.47, representing $1,420 for medical expenses and $2,590 for weekly compensation payments. Van Winkle suffered excruciating pain and extensive burns. The photographs which were tak-

en in the emergency room, approximately three hours after the fire but immediately before any medication or treatment was administered, are revealing. These burns were second and third degree burns of the entire fact, ears, neck and forearms. After the accident and after the dressing of the wounds, Van Winkle remained in the hospital for 14 days during which he obviously suffered from the pressure dressings being tightly wound around his face and arms, the repeated debridement or cutting away of dead tissue during treatment, and the changing of pressure dressings. Remarkable progress is recorded by the photographs marked Nos. 3 through 10, but this progress was not obtained without pain and suffering. After discharge from the hospital, Van Winkle continued to wear bandages on his ears and wrists until May of 1967. Thereafter, he stayed inside mostly to avoid exposure to the sun and for a time could not shave. Even after May of 1967 he continued to wear bandages on his wrists, and if he stayed in the sun too long he says his face turned red and blistered in spots. There is a 10% disability of the motion of his wrists.

Our conclusion is that the sum of $40,000 constitutes full compensation for shock, pain and suffering, scarring, injury, loss of earnings, medical expenses and any and all other elements of damage sustained by Mr. Van Winkle.

## THE INA CLAIMS

Crown Petroleum Corporation was the statutory employer of most of the employees whose deaths or in-

juries precipitated this litigation. INA was the insurance carrier for Crown, covering all risk to the drilling rig known as Crown Drilling Company Rig No. 1. The rig was appraised as having a "sound insurable value" of $421,873. After the fire, the rig was sold back to Crown for salvage of $60,000. INA paid on the face amount of its policy $402,000 plus $3,000 sue and labor charges. Deducting the salvage, INA claims a net loss of $345.000. By virtue of its payment of $345,000 to Crown, INA is legally subrogated to all of the rights which its insured had against Continental. The amount of this loss is vehemently contested. Continental insists that if INA is entitled to recover — which it is not because of Herrington's negligence — an award of $50,000 would be generous.

It is a principle so well established that to cite cases would be an affectation, that once subrogation is recognized, it carries with it all the rights that the subrogor had. Likewise, the defendant may urge against the subrogee the same defenses that it could have urged against the subrogor. Certainly, on the facts found, Herrington's negligence effectively bars a recovery by Crown for the damage sustained by its rig. This claim of INA is likewise barred.

INA also seeks to recover in each case the compensation benefits paid under the Longshoremen's Act. These payments were made by INA in behalf of the employer, pursuant to the statutory scheme whose purpose it is to compensate at least to a degree of the pecuniary loss as sustained by an employee from an injury received in the course of his work. This

pecuniary loss was ultimately allowed the individual plaintiffs in each case and for this reason INA is to be paid by preference and priority (in each case) out of the sums awarded.

There remain the cross-claims (indemnity and other). The Court wishes to hear arguments on this facet of these cases. These arguments will be heard at 9:30 A.M. on December 5, 1969. The Court also invites arguments on its own finding that Crown is responsible for Herrington's acts. Meanwhile, signing of formal judgments will be held in abeyance.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana on this the 14th day of November, 1969.

(Signed) EDWIN F. HUNTER JR.
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

Consolidated Cases, Nos. 13,541, 12,879, 12,816, 13,248, 12,865, 13,484, 13,405, 12,813, 12,927, 12,814, 12,938, 13,526, 13,055 and 12,815

HUNTER, JUDGE: —

MEMORANDUM RULING ON POST-JUDGMENT MOTIONS

Various post-judgment motions have been filed. The issues presented have been briefed and argued extensively. We have dealt with facts and law in two opinions comprising some 45 pages. Surely, it is time that the legal jousting here be concluded so that these multiple donnybrooks in which theories of initial, contingent and secondary liabilities abound, can begin their journey to the appellate courts. However, before doing so, it is appropriate to make a few changes in our original findings and judgment, and to discuss in some detail the issue of Duddleston's alleged negligence.

**DUDDLESTON**

In our opinion of November 14, 1969, in Finding No. 18, we said:

> "Duddleston's position gives us extreme difficulty. Duddleston's expert, Montgomery, testified that if he were welding over the tank with a 4-inch open hole he would have covered it. There was testimony that while the welding was in progress, sparks were falling above and dancing around the top of the white tank. Was a proximate cause of this tragedy the alleged carelessness of Duddleston's cutting above the tank without the 4-inch opening being closed or covered? All counsel except Duddleston's insist that it was. They cite *Kerman v. American Dredging Co.*, 355 U.S.

426, and argue that Duddleston violated a duty of performing his work in a workmanlike manner, and that the breach of that duty was a proximate cause of the fire and explosion, and the resulting deaths and damage. He who alleges negligence must prove it affirmatively by a preponderance of the evidence. This is so of those instances where the facts and inferences do not preponderate one way or the other. We must, and do, find that plaintiffs have failed to carry their burden of proving proximate negligence on the part of Duddleston."

Duddleston, an independent contract welder, was cutting with his torch on a piece of pipe directly above the opening of the tank. It was argued by other defendants that if Duddleston had merely stepped down on the tank and checked its contents by smell, he would have detected the presence of inflammable condensate. It is also argued that Duddleston failed to place any wet sack or material beneath him to protect this area from fallen molten material. After reviewing the motions and briefs filed for rehearing, the Court was in grave doubt concerning Duddleston and ordered counsel into court to have the matter re-argued on the issue of whether or not, under the total circumstances of the case, the burden was on Duddleston to rebut a presumption of negligence. If so, Duddleston must be held liable in conjunction with the others upon whose liability this Court has already passed.

A Louisiana appellate court, in *Fireman's Mutual Insurance Company v S. S. Jacobs Company*, 162 So. 2d 816 (La. App. 1964), stated:

> "We think the doctrine of res ipsa loquitur invoked by the plaintiff does have an application here. The instrumentality which caused the fire and resulting damage to plaintiff was a welding torch, the dangerous nature of which is too well known to admit of doubt. It was in actual control of an employee of a sub-contractor and perhaps within the constructive control of the general contractor. The accident was not of a kind which ordinarily occurs in the absence of negligence. The defendant, in whose control the welding torch is, cannot escape liability merely by asserting his own exercise of reasonable care."

*Northwestern Mutual Fire Association v Allain*, 226 La. 788, 77 So. 2d 395 (1954), was a suit by the insurers, as subrogees of the insured, to recover amounts paid for fire damage to the insured's building on which the painters had used a blowtorch to burn off old paint. Plaintiffs conceded that they could be successful only if they could show that res ipsa loquitur applied. The doctrine was held applicable and judgment for the plaintiffs was affirmed. The Court stated:

> "When the doctrine of res ipsa loquitur is applicable to a case, the accident which has caused plaintiff's damage makes out a prima facie case of negligence on the part of the defendant, and the burden is then on the defendant to show absence of negligence on his part."

The case of *United States v. Todd Engr. Dry Dock & Repair Co., Inc.*, (E.D. La. 1931), 53 F 2d 1025, was a suit in Admiralty by the United States against Todd to recover damages, pegged on the proposition that respondent, while engaged in performing work on a ship, was negligent in the use of an acetylene torch, thereby causing a fire to originate and spread, resulting in substantial damage to vessel and cargo. The Court held (1) that respondent's agents were using the torch up to a few seconds before the fire; (2) on the evening of the fire, the tank tops in the fire room of the ship were littered with old pipe covering, debris and pieces of canvas which resulted from respondent's work; and (3) respondent's servants took no precautions but proceeded to use the oxy-acetylene torch without examining the tank tops or looking into the bilges and without employing any of the usual and customary safeguards and this failure to duty on their part constituted gross negligence. The Court stated:

> "It was unquestionably the duty of the repairmen to secure full information as to the dangers presented, and this of course required them to examine into the condition in the bilges and on the tank tops to determine whether or not they were sufficiently clean. If they were not clean, they should have been cleaned and a man then given a bucket of sand or a fire extinguisher whose sole duty would be to watch the sparks and the molten metal. As a further precaution the repairman should have placed a man with a bucket to catch the sparks, and it undoubtedly would have been good practice

to have spread a piece of wet canvas between the boilers to guard the tank tops which were openly exposed."

Here, James Duddleston was sent by his employer to Platform 194-F to perform whatever task his skills might be required for. He was told to weld a rack above the white tank. There is an abundance of evidence in the record showing that there was an opening on top of the tank from which a bull plug was missing and which was not otherwise covered. He began welding and the tank exploded. Is res ipsa applicable? Counsel for Duddleston cite numerous Louisiana decisions in support of the proposition that res ipsa will not be applied where the evidence discloses that the injury might have occurred by reason of concurrent negligence of two or more persons or causes, one of which was not under the management and control of the defendant. This is precisely what Judge Wisdom said the Louisiana law was in *Fidelity & Casualty of New York v. Funel*, 383 F. 2d 42. Opposing counsel, citing *Sussdorff v. Jackson*, 203 So. 2d 901, and *Moak v. Link Belt Co*, 229 So. 2d 395, do not accept as the Louisiana law the rule enunciated in *Funel*. *Sussdorff* was decided in 1967, *Moak* in 1969. *Sussdorff* involved two automobile drivers, and the holding was that the burden of proof was upon each driver to exonerate himself from fault and that each would be deemed negligent in the absence of a showing to the contrary. If this were the law of Louisiana, or is held eventually to be the law, then Duddleston should be held at fault here, equally with the others. We accept the law as

it is set forth by the Fifth Circuit in *Funel*, and hold that it has not been altered by *Sussdorff* or *Moak*.

Counsel for Continental insists that Article 2317 of the Louisiana Civil Code is applicable. There, the Code provides:

> "Art. 2317. Acts of others and of things in custody.
>
> "Art. 2317. We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications"

In *Dupre v. Travelers Ins. Co.*, 213 So. 2d 98, La. App. 1968, the Court, in discussing the Article, noted:

> "While we are in agreement with the above cited case we do not believe that it stands for the proposition that LSA-CC. Art. 2317 imposes absolute liability for damages caused by one's property, but rather a refutable presumption of negligence."

Clearly, Duddleston had a burning torch, which is recognized and admitted to be a dangerous instrumentality in his ownership and custody. If there is "a refutable presumption that one is responsible for something in his custody, as stated by the Civil Code Article and

case cited, supra, then where the instrument in the person's custody is a dangerous instrumentality, and an accident ensues, there would be a burden on the custodian to refute a presumption of negligence. The jurisprudence on Article 2317 is scant. A major contribution in this area appears in Volume 43, Page 907 of the Tulane Law Review, wherein 2317 has been synthesized and analyzed. The conclusion of the author is that the Louisiana courts have not yet discovered what has long lain dormant in Article 2317. It is pointed out that different interpretations are possible. Article 2317 could be understood as merely introducing the subsequent articles which speak of the responsibility of parents for the acts of their children, of curators for the acts of insane persons under their care, of the owners of animals for the acts of their animals, and of the owners of buildings for the condition of these structures. On the other hand, if Article 2317 has substantive content, then it either requires the existence of fault or it does not. If it requires fault, then the burden of proving the fault is on the person urging fault, or else the Article raises a presumption of fault to be refuted by the person charged with custody. We agree with *Dupre*, supra, that 2317 does not impose absolute liability. Our holding is that 2317 brings about a refutable presumption of negligence, but that it must be equated with res ipsa, and is governed by the Fifth Circuit's language in *Funel*. The original judgment as to Duddleston stands.

We add a few additional paragraphs. Continental, Aetna and Houma argue that the Court erred in failing to find that Crown assumed the obligation of indemni-

fication after having found that Crown assumed all the obligations of the drilling contract (Finding of Fact No. 2, page 12a). On Page 8 of the supplemental opinion we set forth the finding that the evidence failed to establish any undertaking by Crown to be responsible for Continental's negligence. To this extent Finding of Fact No. 2 on page 12a of our original opinion is amended and modified.

In case No. 13,484 we add a finding to the effect that Duddleston was not an employer of Houma or Crown. Then, too, the indemnity agreement between Houma and Continental did not contain any indemnification for injury to or death of an employee of Duddleston.

We reiterate a finding that the fault of Continental and Herrington was proximate, active and equal. No useful purpose would be served by entering into a discussion of contingent findings which might become applicable, should this or that finding or conclusion be found erroneous.

The plaintiffs' motion to allow interest from date of judicial demand rather than date of judgment is granted, and the original judgments are modified in that particular. Otherwise, all post-judgment motions are denied.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, on this the 4th day of March, 1970.

(Signed) EDWIN F. HUNTER
UNITED STATES
DISTRICT JUDGE

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 30,631

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WILLIAM ERNEST DICKERSON, ET AL,
Plaintiffs-Appellees-Cross Appellants,

versus

CONTINENTAL OIL COMPANY, ET AL,
Defendants-Appellants-Cross Appellees

and CHARLES N. DUDDLESTON
d/b/a DUDDLESTON WELDING COMPANY
Defendant-Appellee,

HOUMA WELL SERVICE INC, and
CROWN PETROLEUM CORPORATION.
Third Party Defendants-Appellees.

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Appeals from the United States District Court for the
Western District of Louisiana

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(September 28, 1971)

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Before TUTTLE, WISDOM and INGRAHAM,
Circuit Judges.

TUTTLE, Circuit Judge: This appeal, accurately described by the trial court as "a multiple donnybrook" in which theories of initial, contingent and secondary liabilities abound, arose out of an explosion and fire which occurred on February 3, 1967 on an offshore stationary (fixed) drilling platform located in the Gulf of Mexico, on the Outer Continental Shelf. Multiple suits for damages for wrongful deaths, personal injuries and property damage growing out of the explosion were filed. Before discussing the merits of these suits, it is necessary briefly to set forth the facts involved and, in so doing, to delineate the relationships of the multiple parties involved.

## I. *FACTS*

Prior to February 3, 1967, the date of the explosion, Houma Well Service, a drilling contractor under a written agreement with Continental Oil Company, the owner of the stationary platform involved, was drilling oil wells on the platform. The drilling rig utilized was owned by Houma, but prior to the accident, it was sold to Crown Petroleum Corporation.

On January 23, 1967, Continental hired an independent contractor to begin testing one of these wells. During these tests, water, gas and oil were produced. This product was run through a separator and thereby stripped of its liquids. These liquids, referred to as "condensate," were highly volatile and unstable. Though there were various methods of disposing of the condensate, Continental directed that it be poured into a white tank located on the northeast corner of

the platform. This tank was normally used for storing diesel fuel, which is not highly volatile, and the record reveals that all those working in the general area thought the tank contained only diesel fuel. Indeed, prior to the explosion, condensate was never even stored on a drilling platform, much less in a "diesel" tank. The tank itself was not plugged and Continental's representative told no one that it contained condensate.

While this testing was proceeding, Continental hired a contract welder, Duddleston, to do some work on a rack on which a Schlumberger unit was to be placed. Pursuant to this agreement, Jim Duddleston, son of the owner of the welding operations, reported to the platform. One Harvey Herrington also came aboard. He was to act as a tool pusher for the new owner of the rig, Crown Petroleum. On February 2nd, while testing was still in progress, Donald Ray Smith, the foreman for Continental and their only representative on the platform, called together both Herrington and Jim Duddleston to tell them they were to install the rack. Smith testified that this conversation occurred at about 7:00 a.m. on February 2nd. He also testified that later that morning — about 10:00 a.m. — he noticed that the four inch bull plug was not in the top of the white tank and asked Herrington to find it and put it on. He also said that he wanted no drilling done on the rack while the plug was missing, but never told anyone just what the tank contained nor how dangerous it really was. Smith also testified that at no time did he think that there would be cutting done with a cutting torch above the white tank. He left the platform around noon on February 3rd, leaving Herrington in charge. At a-

bout 3:45 that afternoon, while Duddleston was welding over the white tank, the explosion occurred. A bucket which one of Herrington's workers had placed over the hole, apparently disappeared and the trial court found that there was no covering over the hole from 11:30 a.m. until the time of the explosion.

All plaintiffs, except those in the Duddleston case, an entirely separate issue to be dealt with *infra*, named as original defendants, Continental Oil Company and Duddleston Welding Company. Continental has, in turn, filed third party demands and/or cross claims against Crown Petroleum Corporation, Insurance Company of North America, Duddleston and Houma Well Service, Inc. These parties have also cross claimed but we will deal first with the issues raised by the original plaintiffs and defendants.

Of the six plaintiffs in this case, five — Joyce A. Clark, Esta Faye Bishop, Ruth Clark, Lula Mae Taylor, and Shirley Hester — are appealing from what they consider inadequate and erroneous damage awards for wrongful death: the sixth, William Ernest Dickerson, appeals from his award for personal injuries on the ground of inadequacy. In addition, while agreeing with the trial court's finding that the negligence of Donald Ray Smith, Continental's drilling foreman, was a proximate cause of the accident, they also maintain that the trial court erred in failing to impose liability on James Duddleston, the welder. They argue that welding over the open tank made him a joint tort feasor; it was a contributing cause to the explosion but was not such as to insulate Continental from liability. We will first deal with these latter contentions, and

then examine the individual damage awards of the plaintiffs.

## II. *APPLICABLE LAW*

In *Rodrique v. Aetna Casualty and Surety Company*, 395 U.S. 351, the Supreme Court held that fixed platforms on the Outer Continental Shelf were "artificial islands." They were to be treated as federal enclaves within a state, and were to be governed by the Outer Continental Shelf Lands Act, 42 U.S.C.A. §1331, et seq., which incorporated and federalized the law of the adjacent state where not inconsistent with federal law.[1]

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[1]Section 1333 provides:

"(a) (1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected theron for the purposes of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State.

(2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of August 7, 1953 are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf."

43 U.S.C.A. § 1333.

In determining liability and the amount of damages to be awarded in the case the law of Louisiana thus, applies.

## III. *CONTINENTAL'S LIABILITY*

We begin with the liability of Continental. The trial court found that the negligence of Continental was "clear, convincing and gross." Specifically Continental was negligent in the following particulars which proximately caused the explosion:

(a) In failing to provide safe storage for liquids and gases with highly volatile properties;
(b) In causing or permitting said liquids and gases to be stored in a tank which was being used for diesel fuel and liquids of less dangerous properties;
(c) In permitting welding operations in an area containing an explosive atmosphere
(d) In failing to post signs and otherwise warn workmen that the storage tank contains highly volatile liquids and gases; and
(e) In storing condensate on board a platform at sea when safer alternatives were available

We agree with these findings and the conclusion of the trial court.

It is Continental's view, however, that the trial court held it liable primarily on the basis of a failure to

warn the plaintiffs that condensate had been placed in the tank and that it was highly volatile. This, they feel, was not a substantial cause of this accident, particularly when taken in connection with other facts found by the trial court. For example, it notes the finding that had the four-inch opening on the top of the tank been closed in a proper manner, the accident probably would not have occurred.

The Louisiana courts have generally defined proximate cause as being:

> Any cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produced the result complained of and without which the result would not have occurred; and from which it ought to have been foreseen or reasonably anticipated by a person of ordinary care that the injury complained of, or some similar injury, would result therefrom as a natural and probable consequence. Sumrall v Aetna Casualty and Surety Company, 124 So.2d 168, 176 (1960) See also, Ardoin v. Williams, 108 So.2d 817 (1959); Harvey v. Great American Indemnity Company, 110 So.2d 595 (1959).

Applying this standard to the case at bar, we have no trouble agreeing with the trial court's conclusion.

In addition to arguing that it was not liable, Continental also contends that the trial court erred in failing to find Duddleston also negligent, thereby at least mak-

ing him a joint tort feasor and at best, an intervening cause insulating Continental from all liability. We have already dealt with Continental's liability and have concluded its negligence was a proximate cause of the accident. Regarding Duddleston, we again agree with the trial court and hold that he was not a joint tort feasor.

It is argued, however, that if Duddleston, who was cutting with his torch on a piece of pipe directly above the opening of the tank, had merely stepped down on the then open tank and checked its contents by smell, he would have realized that it contained condensate. It is also noted that he failed to place any wet sock or material beneath him to protect this area from fallen molten material. In addition, it is contended that the doctrine of Res Ipsa Loquitur applies and, in any event, that liability may be found under Article 2315 of the Louisiana Civil Code.

Once again, we agree with the conclusion of the trial court. Failure to check the tank below or take any extra precautions is excusable in light of the fact that everyone involved thought that only diesel fuel, a non-volatile substance, was in the tank. Further, the record reveals that when Duddleston came aboard and began his job, the regular rig welder had already been working in that general area for six days. Finally, as emphasized above, no warning whatsoever was given regarding the contents of the white tank.

We also hold that the doctrine of Res Ipsa Loquitur does not apply. The trial court based its holding on

*Fidelity and Casualty of New York v. Funel*, 383 F.2d 42 (5th Cir. 1967). Plaintiffs and Continental, however, argue that *Moak v. Link Belt Company*, 229 So.2d 395 (La. App. 1969) compels a contrary result. We feel neither case applies.

As stated in *Moak, supra,* res ipsa loquitur simply means:

> "That the circumstances involved in or connected with an accident are of such an unusual character as to justify, in the absence of other evidence bearing on the subject, the inference that the accident was due to the negligence of the one having control of *the thing* which caused the injury. This inference is not drawn merely because the thing speaks for itself, but because all of the circumstances surrounding the accident are of such a character that, unless an explanation can be given, the only fair and reasonable conclusion is that the accident was due to some omission of the defendant's duty" Id. at 406.

The res ipsa argument advanced in this case is that Duddleston was in control of a dangerous instrumentality, a welding torch, and that he was using it over an open tank. This does not fit the res ipsa doctrine outlined above. "The thing which caused the injury" was the open tank. This was the dangerous instrumentality involved in the accident, not the torch. Duddleston had no control over it and no knowledge whatsoever as to its explosive contents. Further the circumstances

of this accident are not of such a character that "the only fair and reasonable conclusion is that the accident was due to some omission of the defendant's duty." We have already delineated what we feel to have been the proximate cause of this tragic event. The fact that Duddleston innocently lit the fuse of Continental's unmarked time bomb does not invoke the doctrine of res ipsa loquitur, nor does it impose liability upon him.

It is also argued that Duddleston is liable under Article 2317 of the Louisiana Civil Code.[2] Regarding this point, we agree with the reasoning of the trial court. Article 2317 does not impose absolute liability for damages caused by one's property, but rather a refutable presumption of negligence. *Dupre v. Travelers Insurance Company*, 213 So.2d 98, (La. App. 1968). In effect, it may be equated with res ipsa loquitur. In so doing, we reach, of course, the same conclusion as stated above.

## IV. *DAMAGE CLAIMS*

Each plaintiff argues that the amount he or she received in damages is insufficient. Before examining the individual claims of the plaintiffs, we will first deal with an issue common to all.

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[2]Article 2317 provides:

> "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody."

It is argued that in fixing the awards, the trial court did not act independently, but rather seemed constrained by Louisiana jurisprudence in that it seemed bound by a system of "standard or uniform awards." Though little monetary distinction was made between the widows and surviving children, we do not feel that this was due to the fact that the trial judge was failing to exercise his discretion, or indeed, that he felt constrained by Louisiana jurisprudence. The trial court explicitly stated:

> Damages in cases such as this cannot be computed by mathematical formulae nor derived from fixed principles susceptible of being programmed into a computer . . . The simple truth is that there are too many variables. None of us can divine the future. Here, we are governed by Louisiana. The Supreme Court of that state had categorically rejected the use of mathematical formulae in awarding damages. McFarland v. Illinois Central Railroad, 127 So. 2d 183; Pennington v. Justiss-Mears Oil Company, 134 So.2d 59. *The amount to be fixed in each case calls for the independent judgment of an independent judge.* (emphasis added).

The fact that the trial judge was aware of this leads us to the conclusion that even though some of the awards were similar, they were, nonetheless, arrived at by the exercise of the court's discretion.

We now examine the individual claims of the plaintiffs.

(a) *Joyce A. Clark.* Mrs. Clark received a total of $146,521. It was itemized in three items: 1. For the loss of support, contributions, or, as sometimes stated, pecuniary loss for Mrs. Clark and her three children; 2 for the loss of society, love and companionship of deceased and anguish of beneficiaries, (i.e., Mrs. Clark and the same three children); 3. funeral expenses.

Although Mrs. Clark claimed an item of pain and suffering of the deceased prior to his death, the trial court made no finding with respect to whether such pain and suffering was actually experienced by Mr. Clark, and included no item of pain and suffering in the aggregate arrived at in favor of Mrs. Clark.

With respect to the claim of Mrs. Lulu Mae Taylor, whose husband also died, the trial court itemized the damages in the same manner as in the Clark case, but it also added an item for "conscious pain and suffering of decedent prior to his death," amounting to $10,000.

In the cases of persons who filed claims for personal injuries, but who were not killed, the trial court made plain in each instance that the aggregate sum allowed included all elements of injury, including pain and suffering. It seems, therefore, to be apparent that had the trial court intended to make an allowance for Mrs. Clark with respect to pain and suffering of her husband during the short time before he died, it would have done so as a separate item and would not have lumped it into any of the other items constituting the award. Mrs. Clark claims that under the Louisiana cases the

element of pain and suffering must be expressly itemized in a finding of fact. See *Hall v. State Department of Highways,* 213 So. 2d 169 (La. App. 3 Cir., 1968), and also contends that this is required by Federal Rules of Civil Procedure 52(a).

Whether or not the Federal rule requires a separate itemization (it is the Federal Rules that would apply to the matter of findings by a trial court in this federal trial), it seems clear to us that the trial court simply failed to make a finding with respect to a claimed item and with respect to which there was some evidence. We are, therefore, without the guidance of the trial court's determination as to whether the evidence warranted the making of such an award.

The essential facts concerning what happened to the decedent are not in dispute. At the time of the explosion he went overboard and into the ocean. The coroner testified that death was from drowning, and in response to the inquiry as to "interval between onset and death" he had entered the notation "immediate." He had second and third degree burns of the face. The coroner testified in response to question from appellant's counsel as to what he meant by "immediate," as follows: "Immediate from asphyxiation from drowning would mean that the time actually it would take him to drown, which could be of varying period of time, from five to ten minutes." The following question and answer then followed:

"Doctor, if we assume that both of these gentlemen had sustained burns while on a staion-

> ary platform and that subsequently they were found in the water, and their cause of death was found to be drowning, would it be probable, sir, that they, from a medical standpoint, that they experienced pain and suffering prior to their deaths?
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> A They would have some, yes."

Although it does not appear from the record that the decedent was conscious while in the water, neither does it appear that he was unconscious. If the former, then it must be without dispute that he did suffer some pain, not only from the burns but also from the anguish of struggling against drowning. See *Hall v. State Department of Highways*, supra.

Upon remand, the court should make findings with respect to whether, on the undisputed facts of this case, the judgment in favor of Mrs. Clark should include an award for pain and suffering.

(b) *Shirley Hester.* Mrs. Hester received a total of $91,623.40. She too argues that a finding regarding the pain and suffering endured by her husband prior to his death should have been made. Since her situation is precisely the same as Mrs. Joyce Clark's, we reverse this portion of the case for further consideration by the trial court.

In addition, it is also argued that Mrs. Hester's award for "loss of support" is unduly low. It is felt that she and her children were penalized and the only

thing of record that could account for this was the fact that in July, 1965 she and her husband had been informally separated. She argues that though the marriage was "stormy" at the outset, it had developed into a harmonious marriage.

We do not doubt that a reconciliation took place, but in putting money values on essentially priceless relationships, no hard and fast rules can apply. Since we feel there has been no abuse of discretion on the part of the trial court, we affirm this part of the award. See, *Neal v. Saga Shipping Company*, 407 F2d 481 (5th Cir. 1962); *Ohio Barge Line, Inc. v. Oil Transport Company*, 280 F2d 448 (1960).

(c) *Esta Faye Bishop*. Mrs. Bishop received a total award of $95,919.95. She too argues that, because of Mr. Bishop's fine character, good job and the happy, and successful marriage they had, she should have been awarded a larger sum for the death of her husband. For the reasons stated above, we affirm the judgment of the trial court.

Mrs. Bishop also argues that recovery should have been allowed for the five children in their family. Mr. Bishop had two children by his first marriage but both were grown and not dependent upon him for support at the time of the filing of the claim. Subsequent to filing this claim, Rodrigue was decided which, plaintiff contends, by making Louisiana law applicable, gave these two children a claim. A motion was filed to amend the complaint, but it was denied by the trial court as having been filed more than a year after the

death and thus beyond the Louisiana prescription date. It is argued that *Huson v. Otis Engineering Corporation,* 430 F2d 27 (5th Cir. 1970) compels a different result. We disagree. This case specifically states that "*unlike death actions* for which Art. 2315 prescribes both the right and time, non-death rights created by Art. 2315 find their time restrictions in Art. 3536." Because of this, the court held that the one year limit did not apply to non-death rights. Here, we deal with a claim made under Article 2315 for wrongful death. The one year limit thus applies.

It is also contended that three minor children of a former marriage of Mrs. Bishop ought to recover. These children, however, were not adopted by Mr. Bishop. We feel compelled to agree with the trial court.

> "It is true that the Supreme Court of the United States in Levy v. Louisiana, 391 U.S. 68, faulted the Louisiana courts for holding that the word "child" in Article 2315 meant "legitimate" child. The Supreme Court conceded that Louisiana had a broad power to make classifications, but emphasized that it had no right to draw a line which constituted an invidious discrimination against a particular class. It was, added the Court, invidious discrimination to construe the word child so as to deny recovery under Article 2315 by illegitimate children. This case is not Levy. Here, there is neither a

biological nor legal relationship between Mrs. Bishop's children and the deceased. These children do not fit within the classes of persons to whom Louisiana has accorded a right of action for death of another."

(d) *Mrs. Ruth Clark.* Mrs. Clark also argues that amendment of her complaint to include her two major children should have been allowed. For the reasons stated above, we disagree. She also contends that the trial court did not properly apply the law to the evidence in awarding pecuniary loss and loss of love, affection and companionship. Again, not finding that this award was clearly erroneous, we affirm its judgment.

(e) *Lula Mae Taylor.* Mrs. Taylor attacks only the adequacy of the award of the trial court to her and her five year old son. She was awarded $140,791.25. As with the other plaintiffs, we do not feel the trial court abused its discretion and therefore, affirm.

(f) *William Ernest Dickerson.* Dickerson argues that the $50,000 award he received for the personal injuries he sustained was inadequate: Though the award may be on the conservative side, we cannot find it to be clearly erroneous.

*Intervention of Insurance Company of North America*

Since, as noted above, Crown Petroleum Corporation purchased the drilling rig involved prior to the explosion, it was the statutory employer of most of the employees whose deaths or injuries precipitated this liti-

gation. INA was the insurance carrier for Crown covering all risk to the drilling rig. As stated by the trial court:

> "The rig was appraised as having a 'sound insurable value' of $421,873. After the fire, the rig was sold back to Crown for salvage of $60,000. INA paid on the face amount of its policy $402,000 plus $3,000 sue and labor charges. Deducting the salvage, INA claims a net loss of $345,000. By virtue of its payment of $345,000 to Crown, INA is legally subrogated to all of the rights which its insured had against Continental.

INA thus brought suit against Continental and Duddleston to recover the $345,000. The trial court, however, denied this claim on the grounds of the contributory negligence of the Crown tool pusher, Herrington. Although Crown was not made a defendant in the suits brought by its employees and the representatives of its deceased employees, this holding, INA argues, coupled with the holding that Rodrigue demanded application of the doctrine of contributory negligence, defeated their well damage claim against Continental in its entirety. Thus, at issue is whether Rodrigue compels application of this doctrine and if so, whether Herrington was negligent.

## V. *RODRIGUE V. AETNA CASUALTY COMPANY*

Rodrigue involved the death of two men who were killed while working on artificial island drilling rigs

located on the Continental Shelf more than a marine league from the Louisiana coast. Suit was brought under the Death on the High Seas Act and under Louisiana law which, it was argued, was made applicable by the Outer Continental Shelf Lands Act. The District and Appellate Courts held that the Seas Act was the exclusive remedy. The Supreme Court reversed, stating:

> "The purpose of the Lands Act was to define a body of law applicable to the seabed, the subsoil, and the fixed structures such as those in question here on the Outer Continental Shelf. That this was to be federal law of the United States, applying state law only as federal law and then only when not inconsistent with applicable federal law, is made clear by the language of the Act. . .
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> However, for federal law to oust adopted state law federal law must first apply. The Court below assumed the Seas Act did apply, since the island was located more than a marine league off the Louisiana Coast. But that is not enough to make the Seas Act applicable. The Act redresses only those deaths stemming from wrongful actions or omissions 'occurring on the high seas,' and these cases involve a series of events on artificial islands. Moreover, the islands were not erected primarily as navigational aids, and the accidents here bore no

relation to any such function. Admiralty jurisdiction has not been construed to extend to accidents on piers, jetties, bridges, or even ramps or railways running into the sea. To the extent that it has been applied to fixed structures completely surrounded by water, this has usually involved collision with a ship and has been explained by the use of the structure solely or principally as a navigational aid. But when the damage is caused by a vessel admittedly in admiralty jurisdiction, the Admiralty Extension Act would now make available the admiralty remedy in any event.

The accidents in question here involved no collision with a vessel, and the structures were not navigational aids. They were islands, albeit artificial ones, and the accidents had no more connection with the ordinary stuff of admiralty than do accidents on piers."

We feel Rodrigue compels the application of Louisiana's doctrine of contributory negligence in this case. Though maritime law utilizes a doctrine of comparative negligence, the events in question here, as in Rodrigue, all occurred in the platform. As the Supreme Court stated, "for federal law to oust adopted state law federal law must first apply." Since that Court has decided that accidents which occur on such platforms have "no more connection with the ordinary stuff

of admiralty than do accidents on piers," we are compelled to agree that Louisiana law applies.[3]

## VI. *HERRINGTON'S NEGLIGENCE*

We now turn to the alleged contributory negligence of Crown employee, Herrington. The trial court found Herrington negligent in the following particulars:

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[3]This Circuit has dealt with the application of this case in two recent decisions. In Continental Oil Co. v. London Steam Ship Own. Mut. Ins. Ass'n, 417 F2d 1030 (5th Cir. 1969) the court held that Rodrique did not require the application of state law for the damage involved was caused by a collision of the vessel with the platform. This was clearly a case in which the Admiralty Extension Act applied. There being a fully effective maritime right and remedy, the application of state law was unnecessary. As this court noted, the recurring theme of Rodrique was that state law would be applied only when necessary to fill a significant void or gap in the federal law.

In Huson v. Otis Engineering Corporation, 430 F2d 27 (5th Cir. 1970), this court once again applied federal law. Noting that the statute of limitations for non-death cases in Louisiana is found in Louisiana Art. 3536 while the right to bring such an action is found in Louisiana Art. 2315, the Court concluded that "Art. 3536 is a procedural restraint which bars the remedy, but does not extinguish the right." While recognizing that state statutes of limitations are often applied in such situations, the Court voted that such limitations have been rejected when a significant federal interest made them inappropriate. "Never has this been more evident than in the maritime and quasi-maritime area which is traditionally inbued with the laches doctrine and which presents a strong federal urge toward uniformity." Huson at 32. Thus, the court went on to hold that the federal doctrine of laches applies.

Though it is argued that these cases should have a bearing on the case at bar, we feel that for the reasons stated above, this case comes clearly under the Rodrique decisions. Moreover, it should be noted that the Supreme Court has granted certiorari in Huson _____ LW _____.

(a) In failing to properly supervise the work that was being done at the time of the fire and explosion;

(b) In failing to cover the four-inch opening when he knew that welding was to be performed over it and when he knew or should have known that condensate was in the tank. For Herrington to permit welding above the tank without having a plug put in the four-inch hole, as he had told Smith, the Continental pusher, that he, Herrington, would do, and then not to make sure that it was done is negligence of the grossest kind.

INA, however, argues that the trial court's conclusion that Herrington "knew or should have known" there was condensate in the tank cannot be justified. They note that Smith, Continental's toolpusher, testified that he told no one that condensate was in the tank. They also contend that the trial court's exclusion of evidence attempting to prove that Herrington, in fact, thought that only diesel fuel was in the tank was erroneous and, in short, reversible error. Finally, they contend that Herrington was the borrowed servant of Continental and even if he were negligent, that negligence ought to be imputed to Continental.

We do not feel that even assuming that Herrington thought that only diesel fuel was in the tank, that that fact alone exonerates him from fault. Smith not only specifically directed him to find a bull plug for the tank, but warned that he wanted no welding done in

that area until one was found. Surely, this should have alerted Herrington that at least the possibility of danger existed or, in other words, that something other than diesel fuel may have been in the tank. Further, Herrington was left in charge of the platform. He was being depended upon by Smith to take care of the tank. He assumed this responsibility and regardless of his knowledge of its contents, the fact he failed to carry out this duty was negligence[4] which, we find, proximately contributed to the tragedy that occurred.

INA also argues that even if Herrington is found to be negligent, this negligence should be imputed to Crown. The trial court, however, found that:

> ". . . Herrington, the tool pusher for Crown, was in charge at the time of the explosion. He was in the course and scope of his employment with Crown pursuant to Houma's contract with Continental."

We feel there is sufficient evidence to support this finding. Here the matter rests.

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[4]The Trial Court found:

> The evidence reveals further that Herrington contrary to what he told Smith, apparently did not look for a plug, but called on the driller, Fregia, to put a bucket over the four-inch opening. Fregia testified that he was told to do this on the morning of the fire. Actually, the person who put a bucket over the four-inch opening was Claude Blanchard, who was told to do so by Fregia. He said that he used a piece of iron to hold down the bucket because the wind would blow it off. Some ways it did disappear and we find there was no covering over the hole from 11:30 a.m. until the time of the explosion.

Having dealt with the issues raised by the original plaintiffs and defendants in this suit, as well as the intervention of INA, we now turn to the cross claims.

## VII. *CONTINENTAL V. HOUMA WELL SERVICE AND AETNA*

Houma Well Service and its insurer, Aetna, are third party defendants. Continental filed a third party complaint against Houma, seeking indemnification for any sums which Continental might be liable for. The basis of this claim is found in the indemnity provisions of the drilling contract between Continental and Houma, which was signed on August 15, 1966. Houma argues that it should not be held to this agreement since it sold its rig on January 24, 1967 to Crown. It is contended that this sale was, in effect, a novation which relieved Houma of its contractual obligations with Continental. Thus, these obligations were taken over by Crown, all with the knowledge and assent of Continental.

The trial court found to the contrary and we agree:

> "There is considerable factual dispute as to the relationship of Houma and Crown, but no formal notice of the sale of the rig was ever given to any authorized official of Continental, and never was there any written notice of any kind to Continental, either by Houma or Crown. Nor was there any written assignment of the contract so as to relieve Houma of its liability, as called for by Article 16 of the contract."

Houma also argues, however, that even if the indemnification agreement is in effect, its pertinent provisions are invalid for they are against public policy. Paragraph 15 of the agreement states that Continental is to be indemnified against any and all claims of any employee of Houma, even though the claim is occasioned by the negligence of Continental.[5] In *Bisso v. Inland Waterways Corporation*, 349 U.S. 85 (1955), the Supreme Court, in dealing with the problem of whether a towboat could validly contract against all liability for its own negligent towage, held that such contracts were against public policy. In *Dixilyn Drilling Corp. v. Crescent Towing and Salvage Co.*, 372 U.S. 697 (1963), the court, relying on Bisso, struck down a similar contractual provision. Both these cases, however, deal with towage contracts which clearly are within the realm of federal maritime jurisdiction. The indemnity agreement in this case, however, is similar to the welder's contract in Grigsby, supra. In that case, this court stated:

> "Probably at this point the admiralty judge must forsake his amphibious woolsack (citations omitted), and return to that less expansive function of *Erie* — seeking Louisiana law.

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[5] "Contractor agrees to indemnity and hold harmless Company. . . . against any and all claims, demands or suits . . . which may be brought against Company . . . by any employee of Contractor of the legal representative or successor of such employee in anywise arising out of or incident to the work to be performed under this contract . . . and even though occasioned, brought about, or caused in whole or in part by the negligence of Company, its agents . . . ."

> The contract is not maritime and if it were, this aspect seems more like insurance and now much latitude is left to the states even as to maritime insurance (citations omitted). Thus this Louisiana-trained Judge was faced with the problem of Louisiana policy considerations on indemnity contracts indemnifying one against his own negligence.

Thus, in applying the law of Louisiana, we are in accord with the Outer Continental Shelf Act. Since this is clearly a state matter, we are not, in so doing, acting in a manner which is inconsistent with any established federal law on this subject.

Louisiana law is clear. Provided that the particular provisions in question clearly express the desire to indemnify even though an accident occurs through the negligence of the indemnitee, *Mills v. Fidelity and Casualty Co.*, 226 F.Supp. (W.D. La. 1964), which we find to be the case here, a Louisiana Court has held:

> "We find no possible violation of public policy in the application of the indemnity agreement in the instant case. To hold that a party cannot protect itself through indemnification or insurance against liability for its own negligent acts would not only do violence to well established authority to the contrary but would strip vast numbers of the protection accorded by such contracts." Jennings v. Ralston Purina Company, 201 So. 2d 168.

Houma also argues that the indemnity contract did not apply to the facts of this case They contend that the contract was designed to cover only work which Houma was obligated to perform under its *drilling* contract, and that none of the work in connection with the alleged accident was a part of the work to be performed by Houma. The trial court however, noted the following phraseology:

> ". . . in any wise arising out of or incident to the work to be performed under this contract."

It went on to find that the contract provided work to be done *in connection with* the drilling and completion of wells. Further, this court noted:

> The indemnification agreement did not say that it covered only work that was to be done by the contractor, but rather incident to or growing out of the work done under the contract. All of the work on the platform at the time of the fire was work arising out of or incident to this contract, including the tying in of the Schlumberger rack *to the drilling rig* which was situated on the platform. (emphasis added)

We agree with this interpretation.

Finally, Continental argues that the trial court erred in limiting Houma's liability to the amount of the contractually required coverage, $300,000. We agree with the conclusion of the trial court. Section IV, subsection

10(b) of the agreement dealing with the contractual insurance coverage clearly states:

> Comprehensible General Liability Insurance with Bodily injury limits of not less than $100,000 for one person and $300,000 for any one accident, and with a property damage limit of not less than $25,000 for each accident. Such policy shall be written to cover all obligations imposed by Article VI of this contract, and to include coverage for surface damage from blowout and cratering.

We feel this clearly stated the limits of Houma's liability.

## VIII. *THE CLAIMS AGAINST CROWN*

Houma contends that if it is required to indemnify Continental, it should be entitled to a like indemnification from its assignee, Crown. Thus, the issue presented is whether, upon purchase of the drilling rig from Houma, Crown assumed the indemnity agreement between Houma and Continental. The trial court made the following findings of fact:

> (1) Houma prepared the 15 page contract dealing with the sale of the rig which made no mention of the indemnity agreement.
>
> (2) Houma did not furnish a copy of the drilling contract or the indemnity provision to Crown or make any reference to it whatever in

the entire course of its negotiations with Crown.

(3) Mr. H. Martin of Houma did not know whether Houma "would negotiate a new contract with Continental or whether they would just take over the contract that I had.

(4) The only element of the Continental/Houma contract which H. Martin brought to the attention of Crown was the requirement that an assignment be in writing.

(5) No such assignment was made.

(6) Houma maintained its insurance coverage on the rig with Aetna.

The trial court concluded that the indemnity claims against Crown were without merit. In light of the above findings of fact which we do not find to be clearly erroneous, we agree.

## IX. *MR. AND MRS. DUDDLESTON*

The Duddlestons brought suit for the wrongful death of their son, James. Both were awarded $20,000 together with funeral bills in the sum of $3,264.95 in favor of Mr. Duddleston as the administrator of the estate of his son. The trial court, however, nullified the award to Mr. Duddleston as well as the funeral bill to Duddleston, in his capacity as administrator of his son's succesSon, on a "confusion" doctrine that arose out of an indemnity agreement executed by Duddleston

and Continental Oil Company. In the words of the trial court:

> "Continental insists that Duddleston's agreement to indemnify Continental resulted in uniting the quality of both debtor and creditor in the same person, therby causing a confusion of rights which extinguished the obligations. We agree. The qualities of debtor and creditor became united in Duddleston, and under the clear wording of the Louisiana Civil Code there arose 'a confusion of right which extinguishes the obligation.' La. Civil Code Act 2217 (1870). The 'generality of the language of the Code indicates, that donation prescription, or any other method of acquisition of the two sides of an obligation by the same person, will extinguish the obligation by confusion.' Comment, 36 Tulane Law Review 521, 523 (1962). Thus, 'the manner in which the same person becomes the creditor and debtor of an obligation is immaterial.'" Id.

Duddleston, relying on *Dumas v. United States Fidelity and Guaranty Company*, 134 So.2d 45, argues that Article 2217 does not apply. There is no uniting of the relationship of debtor and creditor. Continental is the principal debtor and Duddleston is the creditor. However, the trial court failed to adopt this view for, by reason of the indemnity agreement, Duddleston had expressly made himself a debtor of Continental. We agree.

## X. CONCLUSION

We have carefully reviewed this record and considered the claims of the twelve claimants, cross-claimants and third party claimants. We conclude that with the exception of the noted failure of the trial court to make findings as to pain and suffering of Clark and Hester and giving effect to such findings the judgment must in all things be AFFIRMED.

Supreme Court, U.S.
FILED
DEC 18 1971
E. ROBERT SEAVER, CLERK

IN THE

# Supreme Court of the United States

October Term, 1971

No. 71-683

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner,

versus

CONTINENTAL OIL COMPANY and
CHARLES N. DUDDLESTON, d/b/a
DUDDLESTON WELDING COMPANY,
Respondents.

## BRIEF IN OPPOSITION TO INSURANCE COMPANY OF NORTH AMERICA'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable Warren E. Burger, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The Respondent, CONTINENTAL OIL COMPANY, prays that petitioner's application for a writ of certiorari be denied by this Honorable Court.

## ARGUMENT

The Fifth Circuit, in line with *Rodrigue*,[1] held that in cases involving accidents occurring on stationary platforms on the Outer Continental Shelf, the law of the adjacent state is to be applied rather than maritime law. Petitioner, however, has asked that this Honorable Court grant writs to review and ultimately reverse the Fifth Circuit's ruling that the Louisiana Law of contributory negligence should apply in lieu of the Maritime Doctrine of comparative negligence, and it cites as authority the Fifth Circuit's decision in *Chevron Oil Company v. Huson*, 430 F.2d 27, wherein that Court held that the Louisiana Statute of Limitations was not applicable and applied, instead, the Maritime Doctrine of Laches. Petitioner argues that "like treatment should be given the problem of mutual fault." Petitioner's brief, at page 11.

However, this Honorable Court has now categorically rejected this argument by handing down its decision on December 6, 1971 in *Chevron Oil Company v. Huson*, (No. 70-11), ____ U.S. ____. This Court stated in *Rodrigue* and it has reaffirmed in *Huson* that Louisiana law and not Maritime law is applicable to cases such as this.

Petitioner bases virtually his entire argument on Conflict of Law Principles regarding substance and procedure distinctions but *Huson* makes it very clear

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[1]Rodrigue v. Aetna Casualty & Surety Company, 395 U.S. 351 (1969).

that "ordinary conflict of law principles have no relevance."[2] Furthermore, Petitioner's approach in brief, as was the Fifth Circuit's approach in *Huson* "subverts the congressional intent documented in *Rodrigue*, id., at 359-366, that Admiralty Doctrines should *not* apply under the Lands Act."[3] (Emphasis by the Court) Petitioner argues for the "long-sought-for dream of 'uniformity of results' ",[4] and suggests that the granting of his application for writs and ultimately the reversal of the Fifth Circuit's ruling that Louisiana law and, concomitantly, contributory negligence applies would achieve that result. But this Honorable Court has recognized in *Huson* that "Congress specifically *rejected* national uniformity and specifically provided for the application of state remedies . . ."[5]

Petitioner has also raised the question as to whether or not *Rodrigue* and its progeny should be applied retroactively, and it might appear at first blush that *Huson* lends support to that argument. However, it is important to remember that this Court in *Huson* refused only to apply Louisiana's Statute of Limitations retroactively. It reasoned that retroactive application of this doctrine would deprive the Plaintiff of *any remedy* whatsoever on the basis of a superseding legal doctrine which was unforeseeable. According to the Court, it would thus produce inequitable results of irrevocable proportions by lulling the Plaintiff into

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[2]Chevron Oil Co. v. Huson, _____ U.S. _____ (1971).
[3]Ibid.
[4]Petitioner's brief, at page 15.
[5]Chevron Oil Co. v. Huson, supra.

"sleeping on his rights" and then denying him his day in court.

These same considerations are simply not present, however, when one considers the effect of the retroactive application of other substantive aspects of *Rodrigue*, such as the application of fault doctrines, for example. The obvious fact is that Petitioner will not have been denied his day in court, and the very same principles of negligence will have been at issue; it is only their legal application that may differ in the end. To apply *Rodrigue* retroactively would not deprive plaintiff of his remedy; this he would still have, although by his own tortious conduct, he may ultimately be denied the right to recover damages. This would certainly produce no inequitable result.

This Honorable Court, for that matter, made it very clear in *Huson* that it did not hold that *Rodrigue* in its entirety must be applied nonretroactively. The Court specifically stated that "retroactive application of all state substantive remedies under Rodrigue would not work a comparable hardship or be so inconsistent with the purposes of the Lands Act."[6]

## CONCLUSION

Thus, there are no special and important reasons as envisioned by Rule 19 of the Supreme Court Rules for this Honorable Court to grant writs in this case. This Court, in *Rodrigue* and again in *Huson* has made

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[6]Ibid.

it very clear what law is to be applied under factual circumstances as exist in the case at bar, and the Fifth Circuit's decision is four-square in line with this Court's pronouncement. No useful purpose would be served by taking up this Court's valuable time to have the Court reconsider legal issues so recently resolved by this Court. Petitioner's application for writs should, therefore, be denied.

Respectfully submitted,

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